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No. 15307

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, APPELLANT

v.

**D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY;
HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAM-
MONT BANVILLE; JOE LOERA; ANASTACIO HOLQUIN;
WILLIAM L. (ROY) MILLER; OTTO SCHUBERT;
WALTER O. LISSER; AND WALTER SCHMIDT, SECRE-
TARY-TREASURER OF ASSOCIATION OF INDEPENDENT
WORKERS OF AMERICA, APPELLEES**

**ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

KENNETH C. McGUINNESS,
General Counsel,

STEPHEN LEONARD,
Associate General Counsel,

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FILED

JAN 28 1957



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ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This is an appeal by the National Labor Relations Board from an order, issued July 16, 1956, by the United States District Court for the Southern District of California, Central Division. That order refused to enforce certain subpoenas *duces tecum* and *ad testificandum* issued by the Board pursuant to Section 11 (1) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.*), and di-

rected to the above-named appellees. The jurisdiction of the Court below was based on Section 11 (2) of the Act.¹ The jurisdiction of this Court is invoked under 28 U. S. C. 1291.

STATEMENT OF THE CASE

On April 30, 1956, the General Counsel acting on behalf of the Board and pursuant to his powers under the Act, issued through the Regional Director at Los Angeles a consolidated complaint against the Lewis Food Company and the Association of Independent Workers of America, alleging that the Company had engaged and was engaging in unfair labor practices, in violation of Section 8 (a) (1), (2), and (3) of the Act, and that the association had engaged and was engaging in unfair labor practices, in violation of Section 8 (b) (1) (A) and (2) of the Act. The consolidated complaint was issued and served upon the parties together with an order of consolidation and a notice that a hearing would be conducted, before a duly designated Trial Examiner of the Board, on the allegations set forth in the complaint (R. 19-26).

On June 1, 4, and 5, 1956, at the written request of counsel for the General Counsel, and in accordance with Section 11 (1) of the Act and Section 102.31 (a) of the Board's Rules and Regulations (29 C. F. R. 102.31 (a)), the Regional Director at Los Angeles issued certain subpoenas *ad testificandum* and *duces tecum* directed to appellees, under the seal of the National Labor Relations Board and under the fac-

¹ The pertinent statutes and regulations are appended hereto (pp. 26 *et seq.*, *infra*).

simile signature of Abe Murdock, a member of the Board (R. 30-43).

On June 11, 1956, appellees filed Petitions to Revoke Subpenas with the Regional Director, asserting that (1) the Board could not delegate its power to issue subpenas to the Regional Director, and (2) counsel for the General Counsel is not a party to the unfair labor practice proceeding, entitled to the issuance of subpenas. As to the subpenas *duces tecum*, appellees Lewis and Schmidt also challenged the relevancy of the records and documents required to be produced (R. 44-51).

On June 11, 1956, the Regional Director, in accordance with Section 102.31 (b) of the Board's Rules and Regulations, referred the Petitions to Revoke Subpenas to the Trial Examiner who, after consideration of the petitions, supporting memoranda, and oral argument, denied the petitions. Appellees nevertheless refused to obey the subpenas. The Trial Examiner thereupon, at the request of counsel for the General Counsel, continued the unfair labor practice hearing pending applications to have the subpenas enforced by the court below (R. 51-80).

The Board, by its General Counsel, on June 29, 1956, filed with the court below an application for an order requiring appellees to obey the subpenas involved herein (R. 3-9).

Appellees resisted enforcement of the subpenas on the grounds that (1) the Regional Director did not have authority to issue the subpenas, (2) the Trial Examiner did not have authority to rule upon ap-

rected to the above-named appellees. The jurisdiction of the Court below was based on Section 11 (2) of the Act.¹ The jurisdiction of this Court is invoked under 28 U. S. C. 1291.

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Appellees resisted enforcement of the subpenas on the grounds that (1) the Regional Director did not have authority to issue the subpenas, (2) the Trial Examiner did not have authority to rule upon ap-

pellees' Petitions to Revoke Subpenas, and (3) counsel for the General Counsel was not entitled to the issuance of subpenas upon his application. Appellees Lewis and Schmidt did not renew their objections to the relevancy of the documents and records required to be produced by the subpenas addressed to them.

The court below, on July 30, 1956, issued its order quashing the subpenas on the authority of *N. L. R. B. v. Pesante*, 119 F. Supp. 444 (S. D. Calif.) (R. 83-84). The *Pesante* case, so far as here relevant, held (1) that subpenas issued under facsimile signature of a Board member are valid under the Act; (2) however, that the Board must itself pass upon petitions to revoke subpenas; and (3) that the General Counsel is not a "party" to a Board proceeding and hence neither he nor the attorneys under his supervision may request subpenas.

SPECIFICATION OF ERRORS BELOW

1. In holding that only the Board itself has the power to revoke subpenas and that consequently the Trial Examiner was without authority to rule on appellees' petitions to revoke the subpenas here in question.

2. In holding that the subpenas were invalid because they were issued upon the request of counsel for the General Counsel, who is not a "party to the proceeding" within the meaning of the Board's Rules and Regulations, and therefore not entitled to request the issuance of subpenas.

3. In quashing the subpenas and refusing to grant the Board's request for their enforcement.

ARGUMENT

Preliminary statement

The Board urged before the District Court that it could delegate to subordinates its power of issuance and revocation of subpoenas. It also urged, as to the issuance of subpoenas, that that function, compulsory in nature and entailing no act of discretion under Section 11 (1) of the Act, represents no more than a ministerial act which, under settled law, is delegable without express statutory authorization. The District Court, on the authority of *N. L. R. B. v. Pesante*, 119 F. Supp. 444 (S. D. Calif.), held that the Board could not delegate its powers to revoke subpoenas. With respect to the question of the Board's authority to delegate responsibility for the issuance of subpoenas, the court below did not reach this question because of its acceptance of the ruling of the Court in *Pesante* that issuance of subpoenas by a Regional Director under facsimile signature of a Board member constitutes issuance by the Board member himself. However, all other courts considering this question have held the procedure here utilized for issuing subpoenas to be valid, not on the narrow ground relied on by the Court in *Pesante*, but rather on the grounds unsuccessfully urged on the court below. *N. L. R. B. v. John S. Barnes, Corp.*, 178 F. 2d 156 (C. A. 7); *N. L. R. B. v. Gunaca*, 230 F. 2d 542 (C. A. 7), affirming 135 F. Supp. 790 (D. C., E. Wis.), certiorari

granted, 351 U. S. 981;² *Edwards v. N. L. R. B.*, 189 F. 2d 970 (C. A. 5), certiorari denied, 342 U. S. 870. In these circumstances, extended discussion does not seem to be warranted and we respectfully refer the Court to the cited cases, particularly to the *Barnes* case, where the Seventh Circuit, after carefully reviewing the Act as a whole, its purpose and policy, and its legislative history, concluded that the Board was acting fully within its powers in utilizing its Regional Directors to perform the ministerial function of issuing subpoenas.

The principal issues to be treated herein, accordingly, are (1) whether a Trial Examiner of the Board has authority to rule upon petitions to revoke subpoenas, and (2) whether the General Counsel is a party to an unfair labor practice proceeding entitled to the issuance of subpoenas upon his request.

I. The trial examiner had authority to rule upon appellees' petitions to revoke subpoenas

A. Introduction

As stated, the court below relied on the decision of Judge Hall in *N. L. R. B. v. Pesante*, 119 F. Supp. 444 (S. D. Calif.) in quashing the subpoenas here involved. Judge Hall construed Section 11 (1) of the Act as requiring the Board itself to pass upon petitions to revoke subpoenas and consequently as prohibiting any delegation of this function to Trial Ex-

² None of the issues presented in this case are before the Supreme Court in the *Gunaca* case, petitioner having abandoned such arguments in his brief on the merits filed in the Supreme Court (No. 77, October Term, 1956).

~~aminers in unfair labor practice proceedings.~~ Section 11 (1), in relevant part, provides that "The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas" and that upon the filing of a petition to revoke "the Board shall revoke such subpoena" if in its opinion the evidence sought is not relevant or is not described with sufficient particularity. The Court in *Pesante* concluded that the excision of the words "or its duly authorized agent or agents" which had been included in the House Bill demonstrated the intent of Congress to limit to the Board or its members, the power to issue subpoenas, and to limit to the Board itself the power to rule on petitions to revoke subpoenas. We believe that the court below was in error in relying on *Pesante*. Not only is the court's conclusion based upon what we believe is a too literal reading of Section 11 (1) of the Act (*infra*, pp. 15-20), but it wholly fails to take cognizance of Section 7 (b) of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C., Secs. 1001 et seq.) which confers upon agency hearing officers subpoena powers coextensive with those of the agency. We turn now to this latter point.

B. The Administrative Procedure Act vests trial examiners with subpoena powers coextensive with those of the agency

Section 7 (b) of the Administrative Procedure Act, referred to above, provides:

* * * Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue sub-

penas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

Thus, under Section 7 (b) hearing officers, "subject to the public rules of the agency and within its powers"³ are empowered to "issue subpoenas authorized by law", to "rule upon offers of proof and receive relevant evidence", and to "dispose of procedural requests or similar matters." Every other court having an opportunity to consider Section 7 (b) in conjunction with Section 11 (1) of the National Labor Relations Act has reached a conclusion contrary to that of the court below, namely, that Trial Examiners of the National Labor Relations Board have authority to rule on petitions to revoke subpoenas.

The Court in *Pesante* had no occasion to consider the effect of the Administrative Procedure Act be-

³ Pursuant to Section 6 of the National Labor Relations Act authorizing the Board to make "such rules and regulations as may be necessary" the Board in Section 102.35 of its Rules and Regulations provided that "the trial examiner shall have authority, with respect to cases assigned to him, between the time he is designated and transfer of the case to the Board, subject to the Rules and Regulations of the Board and within its powers; * * * (b) to grant applications for subpoenas; (c) to rule upon petitions to revoke subpoenas."

cause the subpoena involved in that case was issued in the course of a representation proceeding under Section 9 of the National Labor Relations Act and was returnable before a "non-judicial" hearing officer.⁴ Section 9 of the National Labor Relations Act authorizes the conduct of representation hearings, which are investigatory in nature, by Board employees who do not meet the hearing officer requirements of the Administrative Procedure Act. However, in the instant case the subpoenas were issued in an unfair labor practice proceeding under Section 10 of the National Labor Relations Act and were returnable before a Trial Examiner who was duly qualified under the Administrative Procedure Act. The court below, in relying upon *Pesante*, therefore lost sight of the critical question, which is not the general one of the Board's power to delegate its subpoena power to subordinates, but the specific one of the possession of such power by Trial Examiners by virtue of the Administrative Procedure Act.

This distinction must be kept in mind, for in respect to delegation of subpoena power to subordinates generally (as distinguished from Trial Examiners), one looks only to the basic agency statute and from it seeks to determine whether, under that statute, delegation of the subpoena power, when not expressly authorized, is fairly to be implied. That was the

⁴ Section 7 of the Administrative Procedure Act, whose applicability respecting adjudications is limited to "hearings which section * * * 5 requires to be conducted pursuant to this section," is inapplicable to adjudications involving "the certification of employee representatives" (Section 5 (6)).

problem before the Supreme Court in *Cudahy Packing Co. v. Holland*, 315 U. S. 357, upon which the court in *Pesante* relied, and in *Fleming v. Mohawk*, 331 U. S. 111, which it sought to distinguish, but is not the primary problem here involved. We are not concerned with *implied* powers of delegability under the National Labor Relations Act but rather are concerned with an *express* conferment of subpoena powers upon Trial Examiners, as hearing officers, under Section 7 (b) of the Administrative Procedure Act.

The question of the authority of Trial Examiners of the National Labor Relations Board to pass upon petitions to revoke subpoenas was first presented in *N. L. R. B. v. International Typographical Union*, 76 F. Supp. 895 (S. D. N. Y.). Judge Medina, upon a full consideration of the interrelation of the Administrative Procedure Act and the National Labor Relations Act, concluded that Board Trial Examiners have power to act upon petitions to revoke subpoenas. In the opinion Judge Medina discusses Section 7 (b) of the Administrative Procedure Act at length and also considers the effect of Section 12 thereof providing that "No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly." His conclusion merits quotation here:

There is no contention, nor could there well be, that Section 11 of the National Labor Relations Act as amended in 1947, or that any other provision of the Labor Management Relations Act of 1947 expressly takes from trial examiners the right to issue subpoenas and rule

upon motions to quash, which are in terms or by necessary implication among the powers of trial examiners, as enumerated in Section 7 (b) of the Administrative Procedure Act.

Thus, as the two statutes are to be read together, it seems reasonably clear that the National Labor Relations Board was authorized to formulate rules pursuant to the terms of which trial examiners might issue subpoenas and "dispose of procedural requests or similar matters," such as the determination of whether or not, to use the traditional term, subpoenas should be quashed (76 F. Supp. at 897).

In *N. L. R. B. on relation of Kohler Co. v. Gunaca*, 135 F. Supp. 790, Judge Grubb of the United States District Court for the Eastern Division of Wisconsin, was faced with the identical argument which was made in *Pesante*—that the legislative history of the 1947 amendments to the Act showed an intention on the part of Congress to limit the authority to rule on motions to revoke subpoenas to the Board itself. Judge Grubb, stressing Section 7 (b) of the Administrative Procedure Act, fully upheld the power of Trial Examiners to rule on petitions to revoke. The order enforcing the subpoena in question was appealed to the Seventh Circuit. That Court affirmed, *N. L. R. B. on relation of Kohler Co. v. Gunaca*, 230 F. 2d 542, and adopted Judge Grubb's opinion as its own. The Seventh Circuit's action was foreshadowed by its earlier opinion in *N. L. R. B. v. Barnes*, 178 F. 2d 156, in which in connection with a related problem, the Court clearly indicated its disagreement with the

interpretation of Section 11 (1) of the Act adopted by the Court in *Pesante* (see pp. 18-20, *infra*).

It may be noted that commentators in this field emphasize that Section 7 (b) authorizes agency hearing officers to exercise whatever subpoena powers are possessed by the agency and sanctions the delegation of the agencies' subpoena powers to hearing officers even in instances in which heretofore the Courts have refused to permit such delegation by implication.⁵ Indeed, it has been observed that by virtue of the Administrative Procedure Act the powers exist in the hearing officer independently of delegation and that the agency could not properly withhold such powers from a hearing officer, even if it would. The Attorney General's Manual on the Administrative Procedure Act states (p. 74):

In other words, not only are the enumerated powers thus given to hearing officers by section 7 (b) without the necessity of express agency delegation, but an agency is without power to withhold such powers from its hearing officers. This follows not only from the statutory language, "shall have authority," but from the general statutory "purpose" of enhancing the status and role of hearing officers. Thus, in the Senate Comparative Print of June 1945, p. 14 (Sen. Doc. p. 29), it is stated that "The statement of the powers of administrative hearing officers is designed to secure that responsibility and status which the Attorney

⁵ See Attorney General's Manual on the Administrative Procedure Act, U. S. Department of Justice, 1947, p. 74; Nathanson, *Some Comments on the Administrative Procedure Act*, 41 Illinois Law Review 368, 391-392.

General's Committee stressed as essential (Final Report, pp. 43-53, particularly at pp. 45-46 and 50).'' See also, Sen. Doc. pp. 207, 269, 319-320); cf. Sen. Rep. p. 42 (Sen. Doc. p. 228).

Cf. *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 495.

The conclusion that Section 7 (b) of the Administrative Procedure Act empowers Trial Examiners of the Board to exercise all subpoena powers vested in the Board is not only in harmony with the basic objectives of the Administrative Procedure Act but also is consistent with the effectuation of the policies of the National Labor Relations Act. As Judge Medina said in the *I. T. U.* case, after discussing the legislative history of the 1947 Amendments and referring to the absence of valid reason to deprive Trial Examiners of the power to pass upon questions affecting subpoenas:

Many reasons at once suggest themselves to support the contention that such powers exist; and not the least of these is that, in the absence of such powers, a litigant by the simple expedient of a motion to revoke a subpoena might unreasonably delay proceedings until the motion could be disposed of at Washington by the Board or three members thereof convened for the purpose. An accumulation of such motions to revoke subpoenas, whether the result of mere chance or of a concerted effort to sabotage the functioning of the National Labor Relations Board under the terms of the Labor Management Relations Act of 1947, would perhaps bring the entire machinery of the National Labor Relations Board to a standstill (76 F. Supp., at 897).

In the *Gunaca* case, *supra*, Judge Grubb, after noting the conflicting holdings in the *Pesante* case, on the one hand, and in the *International Typographical Union* and the *Barnes* cases, on the other, found the reasoning of the latter two Courts more persuasive. As he observed, in part (135 F. Supp., at 794):

It would seem to this Court that one should be very slow to presume that the Congress intended to enact a statute which would require a review of testimony possibly two or three thousand miles from the place where testimony was taken after having it transcribed with all the attendant delays and expense in proceeding before the N. L. R. B. that would be involved. Such construction would make it impossible as a practical matter for the N. L. R. B. to carry out its functions.

For the reasons previously alluded to, neither *Fleming v. Mohawk*, 331 U. S. 111 (1947), which affirmed the Administrator's authority under the Emergency Price Control Act to delegate his subpoena power to subordinates, nor *Cudahy Packing Co. v. Holland*, 315, U. S. 357 (1941), which denied the Administrator's authority under The Fair Labor Standards Act to delegate his subpoena power to subordinates, is presently relevant. Each arose prior to the effective date of the Administrative Procedure Act, and *Cudahy* dealt with a state of facts which would not, apart from time, have fallen within its scope. It pertained to an investigation not looking toward an adjudication upon a record and, hence, would not even now be subject to the hearing requirements of Section

7 of the Administrative Procedure Act. The *Cudahy* and *Mohawk* cases were concerned with the factors to be weighed in determining the propriety of implying an authority to delegate subpoena power when not expressly granted. The Administrative Procedure Act authoritatively settles that question in favor of delegation in those situations which it governs. It surrounds the delegation with safeguards that prevent its abuse, and obviates thereby the concern underlying the *Cudahy* case that the subpoena power is "capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer" (315 U. S., at 363). For, under the Administrative Procedure Act, delegation of the subpoena power is limited to the hearing officer who is an informed and responsible quasi-judicial official of assured and independent status.

In view of the foregoing, it is submitted that the court below erred in failing to give effect to the express conferment of subpoena powers upon Trial Examiners contained in Section 7 (b) of the Administrative Procedure Act.

C. Aside from the Administrative Procedure Act, the Board has authority to delegate subpoena revocation powers to trial examiners

As noted above, Section 11 (1) of the National Labor Relations Act, with reference to the revocation of subpoenas, states "the Board shall revoke" under certain specified conditions. The Court in *Pesante*, upon which the court below relied, construed this portion of Section 11 (1) as requiring the Board itself to rule on all petitions to revoke subpoenas and as pro-

hibiting any delegation of subpoena functions to Trial Examiners.⁶ We believe that the conclusion of the Court in *Pesante* attributes to Congress a degree of precision in draftmanship which is unwarranted. In various Sections of the Act Congress used terminology which, if construed with absolute literalness, would appear to rule out the use of subordinates in carrying out many of the Board's functions. However, it has never been seriously suggested that the use of such language precluded the Board from delegating some of these functions to subordinates.

For example, Section 9 (c) (1) states with reference to the investigation of representation petitions that "the Board shall investigate such petition." In Section 10 (k) "the Board is empowered and directed to hear and determine" jurisdictional disputes giving rise to allegations of Section 8 (b) (4) (D) violations. Certainly it cannot be validly contended that the use of the language above quoted indicates an intention to prevent the Board from exercising these functions through subordinates. Cf. *N. L. R. B. v. Barnes*, 178 F. 2d 156, 159 (C. A. 7). Similarly, in providing in Section 10 (j) that "the Board shall have power" to petition for appropriate temporary relief or restraining order, Congress did not intend to prohibit the Board from authorizing the General Counsel to decide when to institute such a proceeding (*Evans v. I. T. U.*, 76 F. Supp. 881, 886-889 (S. D. Ind.)). Consequently, since other provisions of the

⁶ As stated in n. 3, p. 8, *supra*, the Board in its Rules and Regulations has formally delegated to its Trial Examiners authority "to rule upon petitions to revoke subpoenas."

Act in terms confer only on the Board the exercise of delegable functions, it does not necessarily follow from the fact that Section 11 (1) provides, with respect to subpoenas, that "the Board shall revoke", that Congress intended this function to be exercised by the Board alone.

As indicated, the Court in *Pesante* relied heavily on the circumstance that the section as enacted merely provides that "the Board shall revoke" (119 F. Supp. at 450-451), yet when the amendments to the Act were being considered, Section 11 of the House Bill had specifically provided that the power of revocation could be exercised either by the Board "or its duly authorized agent or agents." However, this occurrence loses decisive significance in light of the fact that the Conference Report (Report No. 510, 80th Cong., 1st Sess.), p. 58, expressly states that "the conference agreement follows the provisions of existing law" except for making the subpoena procedure a two-step operation instead of one, i. e., making issuance of the subpoena automatic but subject to a subsequent petition to revoke (1 Leg. Hist. of the Labor Management Relations Act, 1947, p. 562; 2 Leg. Hist. 1543). Aside from the circumstances noted above, there is nothing in the committee reports or the debates prior to the enactment of the 1947 amendments which suggests any intention on the part of Congress to deprive Trial Examiners of the power to pass upon subpoena matters. See the *I. T. U.* case, 76 F. Supp., at 897.

Under the original Act, as the Seventh Circuit noted in the *Barnes* case (178 F. 2d. at 161), Congress was

well aware that the Board, notwithstanding that the terms of Section 11 (1) referred only to the Board members, had consistently interpreted Section 11 (1) as sanctioning the delegation to Trial Examiners and Regional Directors of the power to issue subpoenas, which, because of the provisions of the Wagner Act, entailed the discretion now exercised at the stage of a motion to revoke.⁷ Yet nowhere in the legislative history of the Amendments is there any suggestion of Congressional disapproval of this construction of the Act. "Under the circumstances", as this Court observed in connection with another point in *N. L. R. B. v. Ray Brooks*, 204 F. 2d 899, 905 (C. A. 9), affirmed 348 U. S. 96, "it is a fair assumption that by its silence on the question Congress accepted this administrative and judicial construction of the Act."

The *Barnes* case, *supra*, fully supports the Board's construction of Section 11 (1). In this case (178 F. 2d 156), the Seventh Circuit had before it the question of the Board's power to delegate its subpoena issuance powers in representation proceedings. The reasoning by which the Court upheld the delegability of such powers is fully applicable here. The Court, in rejecting the very arguments made by appellees in the court below based on the *Cudahy* decision of the Supreme Court (*supra*, pp. 9-10, 14-15), pointed out that the validity of the Board's delegation must be determined,

⁷ Thus Section 11 (1) of the Wagner Act (49 Stat. 449) provided that "Any member of the Board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation."

not from "consideration of the language contained in Section 11 (1)" alone, but in the light of "the Act as a whole, its purpose, what Congress expected the National Labor Relations Board to accomplish under the Act, and its legislative history" (178 F. 2d, at 159). After citing Section 5 empowering the Board to "prosecute any inquiry necessary to its functions" through "such agents or agencies as it may designate" and noting that "the issuance of subpoenas is a necessary incident to the power to investigate and prosecute," the Court concluded that "this expressed power to delegate the authority to prosecute" furnishes "reason to believe that Congress intended that the Board should also be authorized to delegate its subpoena power." The opinion also refers to Section 6 granting to the Board broad power to make rules and regulations "necessary to carry out the provisions of the Act," and goes on to say, quoting from *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 121, that "'Such a rule-making power may itself be an adequate source of the authority to delegate a particular function' * * * (*Ibid*). Finally the Court commented with respect to a similarly "restrictive construction" of Section 11 (1), as follows (178 F. 2d, at 160):

If we were to hold that the Board, or one of its members, must personally do every act essential to the execution and issuance of each subpoena in every proceeding being conducted under this Act throughout the United States and its Territories, and that the Board must then, as a Board, pass upon every *petition for the revocation* of any subpoena, it would be

physically impossible for the Board and its members to perform the many other more important duties which they are required to perform to accomplish the purpose of the Act. [Emphasis added.]

In *Edwards v. N. L. R. B.*, 189 F. 2d 970, certiorari denied, 342 U. S. 870, and *Jackson Packing Co. v. N. L. R. B.*, 204 F. 2d 842, 843-844, the Fifth Circuit also rejected the analogous contention that the Board lacked authority to delegate the power to issue subpoenas. *Edwards* expressly relies upon the *Barnes* case, the reasoning of which, as we have shown, negates appellees' contention that the Board may not delegate its power to rule on petitions to revoke subpoenas after their issuance.

Thus both reason and authority support the construction of Section 11 (1) contended for herein. In these circumstances, and particularly in view of the stated intention of the Conferees to change the subpoena procedure only with respect to making it a two-step procedure instead of the former one-step procedure, we do not believe it reasonable to construe Section 11 (1) as prohibiting the Board from delegating its subpoena powers to subordinates.

II. The subpoenas were properly issued at the request of the General Counsel

The subpoenas in this case were issued at the request of "E. Don Wilson, Counsel for General Counsel." Appellees contended below that the subpoenas are void because not issued, as required by Section 11 (1) of the Act, "upon application of any party" to the unfair labor practice proceeding. In support of their contention, appellees argued that the General Counsel

is not a "party" under the Act, and even if he were a proper party under the Act, he could not delegate his authority to apply for subpoenas to a subordinate employee. The court below, relying on the decision of Judge Hall in the *Pesante* case,⁸ upheld appellees' contention in this regard.

At the outset it should be noted that *Pesante* involved subpoenas issued in connection with a representation proceeding under Section 9 of the Act, while the instant case involves subpoenas requested in the course of an unfair labor practice proceeding under Section 10 of the Act. By virtue of Section 3 (d) of the Act the General Counsel has responsibilities in connection with such proceedings of an entirely different nature from his general supervisory duties in connection with employees handling representation proceedings. Whereas Section 9 of the Act confers responsibility for the conduct of representation proceedings upon the Board itself, Section 3 (d) vests in the General Counsel "final authority, on behalf of the Board, in respect to the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board." By statute, therefore, the General Counsel is the *prosecutor* of unfair labor practice complaints and as such is obviously a principal party to the proceeding. The reasoning of the *Pesante* case, which

⁸ The holding in *Pesante* that a Board Regional Director is not a "party" in a representation proceeding, entitled to request subpoenas under Section 11 (1), was followed in *N. L. R. B. v. Duval Jewelry Company of Miami*, March 30, 1956 (S. D. Fla.), 141 F. Supp. 860. The Board's appeal from the Court's decision in *Duval* is pending before the Fifth Circuit.

involved subpoenas issued in an entirely different context, is thus inapplicable here.

The holding of the court below, that the General Counsel is not a party entitled to the issuance of subpoenas in unfair labor practice proceedings, in effect precludes Board agents from using subpoenas in such proceedings for any purpose, either investigative or for the purpose of compelling the attendance of witnesses.⁹ Such holding, we believe, is manifestly contrary to the plan of the Act as a whole. Congress contemplated that the Board would carry out its functions through subordinates and expressly authorized the employment of "such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties" (Section 4 (a)). As above noted, Section 5 empowers the Board, "by such agents or agencies as it may designate," to "prosecute any inquiry necessary to its functions in any part of the United States." Section 11 of the Act, dealing with the "investigatory powers" of the Board, opens with the express statement that the foregoing powers, including the subpoena power, shall be for "the purposes of all hearings and investigations, which in the opinion

⁹ This conclusion necessarily follows from the holding of the Court below that the General Counsel is not entitled to a subpoena requiring the attendance of witnesses and the production of documents at the hearing in the instant unfair labor practice case and its reliance upon the reasoning of the court in *Pesante*, which involved a request by the Regional Director for the issuance of a subpoena in a representation proceeding. If neither the General Counsel nor the Board's Regional Directors have authority to request the issuance of subpoenas, then it follows that only the Board itself may utilize subpoenas.

of the Board are necessary and proper for the exercise of the powers vested in it by section 9 and section 10." Since, as we have shown, Congress intended that Board agents, rather than the Board members themselves, would conduct various investigations and preliminary hearings required under Sections 9 and 10 of the Act, the conclusion of the court below that Board agents could not utilize subpoenas in the course of such hearings and investigations is manifestly inconsistent with the basic scheme of the Act. Indeed to hold, as the court below in effect has done, that persons being proceeded against by the Government for engaging in unfair labor practices are entitled to compulsory process to secure the attendance of witnesses while the Government agents prosecuting the case are not, is incongruous, to say the least.

The Administrative Procedure Act confirms that Congress intended the General Counsel to utilize subpoenas in the performance of his statutory duties. Section 6 (c) of the Administrative Procedure Act provides "Agency subpoenas authorized by law shall be issued to any party upon request." Section 2 (b) defines "party" as including "any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding." Moreover, the legislative history of these provisions reveals the Congressional purpose of "making administrative subpoenas equally available to private parties and agency representatives" (Attorney General's Manual on the Administrative Procedure Act (1947), pp. 67-68); see also

Sen. Rep. No. 752, 79th Cong., 1st Sess., p. 20; H. Rep. No. 1980, 79th Cong., 2d Sess., p. 33.¹⁰

Finally, insofar as the court below adopted the reasoning of the Court in *Pesante* that the Act does not contemplate "that the General Counsel or any of the attorneys under his supervision * * * could become a 'party', or a partisan in any respect" (119 F. Supp. at 457), we believe that the Court has misconceived the nature of the procedure established in the Act to remedy unfair labor practices. An unfair labor practice proceeding is not, as the court below apparently assumes, like a private lawsuit, where the responsibility for its conduct devolves upon the private party who may have initiated it; rather such responsibility falls upon the Board and its agents, acting in the public interest. As the Supreme Court has said, "Congress has entrusted to the Board exclusively the prosecution of the proceeding. * * * The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 265.¹¹ To perform its functions in the public interest the Board and its agents require the subpoena power no less than do the private parties to

¹⁰ See also the following provision of Section 12 of the APA: "Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons."

¹¹ See also *Aluminum Ore Co. v. N. L. R. B.*, 131 F. 2d 485, 488 (C. A. 7).

the proceeding. Accordingly, the use of subpoenas by Board agents to obtain data and testimony at Board hearings has consistently been sustained by the courts.¹²

Appellees' further argument, that the General Counsel, even if a party, must personally apply for a subpoena, warrants little comment. No citation of authority is necessary to establish the proposition that a party may act through counsel. Appellees filed the applications to revoke subpoenas in this case through counsel. Similarly, the General Counsel requested subpoenas through his counsel. Cf. *N. L. R. B. v. Kingston Trap Rock Co.*, 222 F. 2d 299 (C. A. 3).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the order of the District Court, denying the Board's application for enforcement of the subpoenas issued against appellees, should be reversed.

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NOVEMBER 1956.

¹² See *Edwards v. N. L. R. B.*, 189 F. 2d 970 (C. A. 5), certiorari denied, 342 U. S. 870; *Jackson Packing Co. v. N. L. R. B.*, 204 F. 2d 842 (C. A. 5); *Winn & Lovett Grocery Co. v. N. L. R. B.*, 213 F. 2d 785 (C. A. 5); *N. L. R. B. v. Barnes Corp.*, 178 F. 2d 156 (C. A. 7).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

* * * *

NATIONAL LABOR RELATIONS BOARD

SEC. 3. * * *

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

SEC. 4. (a) * * * The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. * * *

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or

agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

* * * * *

UNFAIR LABOR PRACTICES

SEC. 8. (a) * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: * * * (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than

his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as to the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of

employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C., Secs. 1001, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. As used in this Act—

* * * *

(o) PERSON AND PARTY.—“Person” includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. “Party” includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

ADJUDICATION

SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for agency hearing, except to the extent that there is involved * * * (6) the certification of employee representatives—

* * * *

HEARINGS

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

* * * *

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the

parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

CONSTRUCTION AND EFFECT

SEC. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. * * *

The relevant provisions of the Board's Rules and Regulations, Series 6, as amended (29 C. F. R., Part 102), are as follows:

SEC. 102.26 *Motions; rulings and orders part of the record; rulings not to be appealed directly to Board without special permission; requests for special permission to appeal.*—All motions, rulings, and orders shall become part of the record, except that rulings on motions to revoke subpoenas shall become a part of the record only upon the request of the party aggrieved thereby, as provided in section 102.31. Unless expressly authorized by the Rules and Regulations, rulings by the regional director and by the trial examiner on motions, by the

trial examiner on objections, and orders in connection therewith, shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board in reviewing the record, if exception to the ruling or order is included in the statement of exceptions filed with the Board, pursuant to section 102.46. Requests to the Board for special permission to appeal from such rulings of the regional director or the trial examiner shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party.

* * * * *

SEC. 102.31 *Issuance of subpoenas; petitions to revoke subpoenas; right to inspect or copy data.*—(a) Any member of the Board shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. Applications for subpoenas, if filed prior to the hearing, shall be filed with the regional director. Applications for subpoenas filed during the hearing shall be filed with the trial examiner. Either the regional director or the trial examiner, as the case may be, shall grant the application, on behalf of any member of the Board. Applications for subpoenas may be made *ex parte*. The subpoena shall show on its face the name and address of the party at whose request the subpoena was issued.

(b) Any person subpoenaed, if he does not intend to comply with the subpoena, shall, within 5 days after the date of service of the subpoena upon him, petition in writing to revoke the subpoena. All petitions to revoke subpoenas shall be served upon the party at whose request the subpoena was issued. Such petition to

revoke, if made prior to the hearing, shall be filed with the regional director and the regional director shall refer the petition to the trial examiner or the Board for ruling. Petitions to revoke subpoenas filed during the hearing shall be filed with the trial examiner. Notice of the filing of petitions to revoke shall be promptly given by the regional director or the trial examiner, as the case may be, to the party at whose request the subpoena was issued. The trial examiner or the Board, as the case may be, shall revoke the subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required. The trial examiner or the Board, as the case may be, shall make a simple statement of procedural or other grounds for the ruling on the petition to revoke. The petition to revoke, any answer filed thereto, and any ruling thereon, shall not become part of the official record except upon the request of the party aggrieved by the ruling.

(c) Persons compelled to submit data or evidence at a public proceeding are entitled to retain or, on payment of lawfully prescribed costs, to procure, copies or transcripts of the data or evidence submitted by them. Persons compelled to submit data or evidence in the nonpublic investigative stages of proceedings may, for good cause, be limited by the regional director to inspection of the official transcript of their testimony, but shall be entitled to make copies of documentary evidence or exhibits which they have produced.

(d) Upon the failure of any person to comply with a subpoena issued upon the request of a private party, the general counsel shall in the name of the Board but on relation of such private party, institute proceedings in the ap-

propriate district court for the enforcement of such subpoena, but neither the general counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.

* * * * *

SEC. 102.34 *Who shall conduct; to be public unless otherwise ordered.*—The hearing for the purpose of taking evidence upon a complaint shall be conducted by a trial examiner designated by the chief trial examiner, Washington, D. C., or the associate chief trial examiner, San Francisco, California, as the case may be, unless the Board or any member thereof presides. At any time a trial examiner may be designated to take the place of the trial examiner previously designated to conduct the hearing. Such hearings shall be public unless otherwise ordered by the Board or the trial examiner.

SEC. 102.35 *Duties and powers of trial examiners.*—It shall be the duty of the trial examiner to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint. The trial examiner shall have authority, with respect to cases assigned to him, between the time he is designated and transfer of the case to the Board, subject to the Rules and Regulations of the Board and within its powers:

- (a) To administer oaths and affirmations;
- (b) To grant applications for subpoenas;
- (c) To rule upon petitions to revoke subpoenas;
- (d) To rule upon offers of proof and receive relevant evidence.

(e) To take or cause depositions to be taken whenever the ends of justice would be served thereby;

(f) To regulate the course of the hearing and, if appropriate or necessary, to exclude

persons or counsel from the hearing for contemptuous conduct and to strike all related testimony of witnesses refusing to answer any proper question;

(g) To hold conferences for the settlement or simplification of the issues by consent of the parties, but not to adjust cases;

(h) To dispose of procedural requests or similar matters, including motions referred to the trial examiner by the regional director and motions to amend pleadings; also to dismiss complaints or portions thereof, and to order hearings reopened prior to issuance of intermediate reports (recommended decisions);

(i) To make and file intermediate reports in conformity with section 8 of the Administrative Procedure Act;

(j) To call, examine and cross-examine witnesses, and to introduce into the record documentary or other evidence;

(k) To take any other action necessary under the foregoing and authorized by the published Rules and Regulations of the Board.

No. 15307

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Appellant,

vs.

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANCILLE; JOE LOERA; ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSE; AND WALTER SCHMIDT, SECRETARY-TREASURER OF ASSOCIATION OF INDEPENDENT WORKERS OF AMERICA,

Appellees.

On Appeal From an Order of the United States District Court
for the Southern District of California.

BRIEF FOR APPELLEES.

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PAUL P. O'BRIEN,

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No. 15307

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Appellant,

vs.

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANNVILLE; JOE LOERA; ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSE; AND WALTER SCHMIDT, SECRETARY-TREASURER OF ASSOCIATION OF INDEPENDENT WORKERS OF AMERICA,

Appellees.

On Appeal From an Order of the United States District Court
for the Southern District of California.

BRIEF FOR APPELLEES.

Preliminary Statement.

This brief is presented jointly by Appellees because the questions of law are the same to all parties, costs and fees will be greatly reduced and the record will be less burdensome to this Court.

The facts in this case present the following legal questions:

1. Does the National Labor Relations Board (hereinafter referred to as the "Board") have power under the National Labor Relations Act, as amended, to delegate to subordinates the authority to issue subpoenas?

2. Does the Board have the power to delegate to subordinates the authority to pass upon a petition to revoke a subpoena?

3. Under the Statute and Board Rules and Regulations may a subpoena be issued upon the application of an attorney employed by the General Counsel?

In an opinion by Judge Peirson M. Hall of this Federal District Court in the case of *N. L. R. B. v. Pesante*, 119 Fed. Supp. 444, Judge Hall gave a "No" answer to the second and third questions. Judge Hall ruled that the Board does not have authority to delegate to subordinates the power to rule upon a petition to revoke a subpoena and that a subpoena may not be issued upon the application of an attorney employed by the Regional Director or General Counsel. In the case of *N. L. R. B. v. Duval Jewelry Co.*, 141 Fed. Supp. 860, Federal District Court Judge Choate gave a "No" answer to the third question. Judge Choate ruled that a subpoena may not be issued upon the application of an attorney employed by the Regional Director of the National Labor Relations Board. We adopt and rely on the reasoning and decision of Judge Hall in the *Pesante* case, *supra*, and Judge Choate in the *Duval* case, *supra*.

I.

The National Labor Relations Board Does Not Have Authority to Delegate Its Subpoena Power to Subordinate Officers.

The practice adopted by the Board of having members of the Board sign innumerable subpoenas in blank form and furnishing these subpoenas to subordinates such as the Regional Directors is a peculiar practice. It seems probable that the practice is evidence that the Board had doubt as to its ability to delegate the issuance of subpoenas and attempted to straddle the issue by having the Board members sign the subpoenas although they are actually issued by the subordinates. In this connection it is to be noted that Section 11 of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. A. (Supp.), Secs. 151, *et seq.*), hereinafter referred to as "the Act", refers only to the issuance of subpoenas and does not mention the signing of subpoenas. In any event, whatever the reason for the practice it is clear in view of Section 102.58(c) of the Board's rules and regulations, and the decision in *N. L. R. B. v. John S. Barnes Corp.*, 178 F. 2d 156, that this case involves the direct issue whether the Board has the authority to delegate its subpoena power (that is, the power to issue and/or revoke subpoenas) to subordinate officers. The rubber stamp signing of subpoenas by a member of the Board is to be disregarded in the examination of this basic issue of delegation.

(a) The Provisions of the Act Demonstrate Conclusively That the Subpoena Power Is Not Delegable.

We believe that the terms of the Act itself demonstrate conclusively that the subpoena power is not delegable. We will also discuss below the legislative history of the Act and the cases in point, but we wish to discuss first the terms of the Act.

Section 11 of the Act provides with respect to the subpoena power as follows:

“Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

“(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent

or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.”

The Court will note that there are five sentences in subsection (1) of Section 11. The fifth sentence can be disregarded for present purposes. The Court’s attention is called to a comparison of the first and fourth sentences as against the second and third sentences.

The first sentence, in providing for the examination of evidence and the right to copy evidence, gives the power to the Board “or its duly authorized agents or agencies” —a clear authority to delegate that power.

The fourth sentence, in providing for the administering of oaths, examination of witnesses and the receiving of evidence, also vests the power in any member of the Board “or any agent or agency designated by the Board for such purposes.” Here again the authority given to the Board may be delegated.

On the other hand, the second sentence, which provides for the issuance of subpoenas, gives the power only to “The Board, or any member thereof.” In the third sentence, which provides for revocation of the subpoena, the power is given to “the Board.”

It is submitted that any reasonable person who reads Section 11(1) must conclude without reference to the legislative history, cases or other aids to construction, that Congress specifically provided for delegation by the Board when it intended such delegation and omitted the power

to delegate when it intended that the Board, or a member thereof, should not delegate. If a statute is clear, the Court need not go outside the statute to construe it.

(b) The Legislative History of the Act Also Establishes That the Subpoena Power Is Not Delegable.

In addition to the clear language of the statute, we wish to point out also that the legislative history of the Act establishes that Congress intended that the power to issue subpoenas and to revoke subpoenas could not be delegated. References hereafter are to "Legislative History of the Labor Management Relations Act, 1947, Vol. I (National Labor Relations Board, 1948)."

The first step in the legislative process was H. R. 3020, as reported by the Committee on Education and Labor and as it passed the House of Representatives initially. (Legislative History, op. cit., pp. 74, 201.) This version provided as follows:

"Sec. 11. For the purpose of any proceeding before the Board, or before a member, examiner, or examiners thereof, or for the purpose of any investigation by the Administrator under Section 9—

"(1) The Board, or any member thereof, *or any trial examiner* shall, upon application of the Administrator or any party to such proceedings, forthwith issue to the Administrator or to such party as the case may be, in the name of the Board, subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence or under his control, such person may petition the Board, *or its duly authorized agent or*

agents, to revoke and the Board, *or such agent or agents*, shall revoke such subpoena if in its, *his*, or *their* opinion, as the case may be, the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its, *his*, or *their* opinion, as the case may be, such subpoena does not describe with sufficient particularity the evidence whose production is required. The Administrator, or any member of the Board, *or any examiner or examiners designated by the Board for such purposes*, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.” (Emphasis added.)

The language which should be noted particularly is italicized.

The original Senate version, S. 1126, as reported by the Committee on Labor and Public Welfare and H. R. 3020 as it passed the Senate initially, both provided as follows (Legislative History, op. cit. pp. 133, 261):

“Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

“(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the

production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.”

The Court will note that the Senate Bill contained language entirely different from the House Bill.

Section 11(1) of the Act, as finally adopted (29 U. S. C. A. (Supp.), Sec. 161), is a compromise between the House and the Senate versions. The House provision for an automatic issuance of a subpoena plus the power to revoke was adopted, but the language of the House version regarding delegation of the subpoena power to a “trial examiner” (in the case of issuance of the subpoena) and the delegation to “duly authorized agent or agents” (in the case of revocation of the subpoena) was omitted. In addition, the Senate version was changed to permit the Board to issue subpoenas as well as “any member of the Board.”

We submit that the change in language between the original House version and the final statute must lead to the conclusion that the Congress intended to permit delegation with respect to the powers granted in the first and fourth sentences of Section 11(1), but did not intend to permit delegation with respect to the power of issuing and revoking subpoenas contained in the second and third sentences.

Of course, it is Hornbook law that courts cannot legislate, and this Honorable Court must uphold the statute as written.

**(c) The Foregoing Conclusion Is Also Supported by
Supreme Court Decisions.**

The Supreme Court of the United States has expressed itself on the subject of delegation of the subpoena power in other administrative agencies but has not considered the question involved in the present case. The two principal cases are cited in the Brief filed by the Board—*Cudahy Packing Co. v. Holland*, 315 U. S. 357, 86 L. Ed. 895 (1942), hereafter referred to as “Cudahy”, and *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 91 L. Ed. 1375 (1947), hereafter referred to as “Mohawk”. We rely upon *Cudahy*, the Board upon *Mohawk*, and we believe that an examination of the two cases will show very clearly that the present case is governed by *Cudahy*.

The issue presented by the Board in its Brief involving Section 7(b) of the Administrative Procedure Act does not affect Appellees’ position on this point unless this Court finds under Section 7(b) an express power given Trial Examiners to revoke subpoenas, which we submit it does not. This point will be discussed later in Appellees’ Brief.

The *Cudahy* case held that the Administrator of the Fair Labor Standards Act did *not* have the power to delegate to his subordinates the authority to issue subpoenas. The Court said in part:

“The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power.”

The *Mohawk* case held that the Administrator of the Emergency Price Control Act *was* authorized to delegate to district directors authority to issue subpoenas. The Court, in the *Mohawk* case, approved the *Cudahy* case but held that the *Cudahy* case did not apply to the facts of the *Mohawk* case because of five points discussed in the opinion. Since the *Mohawk* case is later in point of time, and since it distinguishes the *Cudahy* case, we wish to discuss the Court's reasoning in the *Mohawk* case step by step.

The first point made by the Court in the *Mohawk* case (331 U. S. 111, 120) was that the legislative history of the Fair Labor Standards Act involved in the *Cudahy* case showed that a provision granting authority to delegate the subpoena power had been eliminated when the Bill was in Conference. On the other hand, the Court pointed out that the legislative history of the Emergency Price Control Act showed that the Senate Committee report on the bill had stated specifically that the Administrator could delegate any of the powers given to him by such bill. Thus, there are two points of difference in the legislative history of the statutes considered by *Cudahy* and *Mohawk*.

It is apparent that the present case is almost identical with the *Cudahy* situation and is entirely different from the *Mohawk* case. We have already pointed out that the House bill provided for delegation of the subpoena power but that in Conference this provision was eliminated. In the second place, there is nothing in any of the committee reports or in the discussion on the floor of Congress which indicates that the subpoena power can be delegated. Therefore, on the first point of the *Mohawk* opinion, it is clear that the *Cudahy* case controls the present case.

The second point made by the Court in the *Mohawk* case (331 U. S. 111, 121) is that the Fair Labor Standards Act involved in the *Cudahy* decision expressly made delegable the power to gather data and make investigations, the Court in the *Mohawk* case stating that this lends "support to the view that when Congress desired to give authority to delegate, it said so expressly." On the other hand, the Emergency Price Control Act did not contain a provision specifically authorizing delegation of other functions.

Compare the present Act on this point. Like the Fair Labor Standards Act, the present Act expressly grants the power to delegate in several specific areas. First, Section 3(b) authorizes the Board to delegate any of its powers to any group of three or more of its members. Second, Section 5 provides that the Board may delegate the power to prosecute an inquiry necessary to its functions. Third, Section 11(1) provides that the Board's power to examine evidence can be delegated to its agents or agencies. Finally, Section 11(1) provides that the power to administer oaths, examine witnesses and receive evidence can be delegated to the Board's agents or agencies. Therefore, the principle relied upon by the Court in the *Mohawk* case to support the *Cudahy* result, is applicable to the present case even more so than it was in the *Cudahy* case. Obviously, on this second point of argument, the *Cudahy* case should be followed here.

The third point of the Court in the *Mohawk* case (331 U. S. 111, 121) is that the Fair Labor Standards Act of the *Cudahy* case incorporated by reference certain sections of the Federal Trade Commission Act, whereas the Emergency Price Control Act contained its own description of the subpoena power.

Again, compare the present Act. This Act does not incorporate the provisions of the Federal Trade Commission Act by reference but in fact copies portions of the Federal Trade Commission Act almost verbatim. This point appears clearly from a comparison of the pertinent provisions of the three Acts, the Emergency Price Control Act, the Federal Trade Commission Act and the present Act.

Emergency Price Control Act:

“The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena, require any such person to appear and testify or to appear and produce documents, or both, at any designated place.” (Sec. 202 of the Act; 50 U. S. C. A. App. Sec. 922.)

Federal Trade Commission Act:

“For the purposes of sections 41-46 and 47-58 of this title the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses and receive evidence.” (15 U. S. C. A., Sec. 49.)

Present Act:

“Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board,

are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

“(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation or to any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.”

It is apparent that the language of the present Act is almost exactly the same as that of the Federal Trade Commission Act except that the present Act adds the power to revoke and except that there are natural varia-

tions of language due to the different types of operations involved. Also, although we have not set forth the material here, the Court will note that the language used in the Federal Trade Commission Act regarding enforcement of subpoenas, taking of depositions, and immunity of witnesses (15 U. S. C. A., Sec. 49), is almost identical with subdivisions (2) and (3) of Section 11 of the present Act. We therefore believe that the *Cudahy* case on this ground is clearly applicable to the present case.

The fourth point made by the Court in the *Mohawk* case (331 U. S. 111, 121) is that the Emergency Price Control Act gave the Administrator specific power to issue rules and regulations, whereas the Fair Labor Standards Act did not do so. Without more, the present Act would thus be more like the Emergency Price Control Act because Section 6 of the present Act does give the Board power to issue rules and regulations. However, it should also be noted that the Court in the *Mohawk* case states that the rule making power may show authority to delegate a particular function "unless by express provision of the Act or *by implication*, it has been withheld." (331 U. S. 111, 121.) (Emphasis added.) We have already shown that the first three points relied upon by the Court in the *Mohawk* case prove that the present Act has, by implication, clearly withheld the power to delegate the subpoena authority. Therefore, as the Court in the *Mohawk* case recognized, the mere existence of the rule-making power is not enough to overcome the other factors.

The fifth point mentioned by the Court in the *Mohawk* case as more or less an afterthought, is that the Emergency Price Control Act set up a program which was very broad and extensive—"probably the most compre-

hensive legal control over the economy ever attempted," (331 U. S. 111, 122)—and that the Administrator of that statute would have had difficulty performing personally all of the investigative functions given to him. The National Labor Relations Board has broad powers and a good deal of work, but it is obvious that its job in handling labor cases is much less extensive than the work performed under the Emergency Price Control Act.

It is, of course, true that if the National Labor Relations Board followed the plan and simple dictates of the Act and subpoenas were issued and/or revoked by the Board or members of the Board, the members would have more work than if they merely signed a stack of subpoenas in blank and permit the Regional Director and the Trial Examiner to issue and/or revoke them. But there is good reason why that should be so. The *Cudahy* case stated the principle very well in answer to the argument that it would be hard for the Administrator of the Fair Labor Standards Act to issue the subpoenas personally (315 U. S. 357, 363):

"The Administrator . . . points to the wide range of duties imposed upon him, the vast extent of his territorial jurisdiction, and the large number of investigations required for the enforcement of the Act. From this he argues that Congress must have intended that he should be permitted to delegate his authority to sign and issue subpoenas. But this argument loses force when examined in the light of related provisions of the Act and of the actual course of Congressional legislation in this field.

"Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of

oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer. Under the present Act, the subpoena may, as in this case, be used to compel production at a distant place of practically all of the books and records of a manufacturing business, covering considerable periods of time. True, there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form an official command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation. All these are cogent reasons for inferring an intention of Congress not to give unrestricted authority to delegate the subpoena power which it has in terms granted only to the responsible head of the agency."

In light of the five points made by the Court in the *Mohawk* case, we think the conclusion is inescapable that every factor points to the conclusion reached in the *Cudahy* case—the subpoena power is not delegable.

As the Board's Brief states, the Court of Appeals for the Seventh Circuit held in *N. L. R. B. v. John S. Barnes Corp.*, 178 F. 2d 156 (7th Cir., 1949), that the power to issue subpoenas could be delegated by the National Labor Relations Board to the regional directors. This case was followed by the Fifth Circuit without any real discussion of the point in *J. B. Edwards v. N. L. R. B.*, 189 F. 2d 970 (5th Cir., 1951), and in *Jackson Packing Co. v. N. L. R. B.*, 204 F. 2d 842 (5th Cir., 1953). As the Board points out, the *Barnes* case did examine the

problem and is on the point. The only difficulty with the *Barnes* case is that it is demonstrably erroneous and unsound. Since we believe this Court should reach a conclusion contrary to the *Barnes* case, we wish to discuss that case point by point.

The Court, in the *Barnes* case, first stated (178 F. 2d 156, 158) that if the language of Section 11 were the only thing to consider, the Court would be "inclined to agree" that the Board has no power to delegate. In our opinion, this is the only correct point made by the *Barnes* case.

In the second place the Court stated (178 F. 2d 156, 159) that the mere fact that certain sections of the Act give authority to delegate does not deprive the Board of the power to delegate other functions. This statement is much too broad, since the question obviously depends upon the nature of the power which is given expressly and the nature of the power which is attempted to be implied. Also, the statement, as applied to the present situation, is in direct conflict with the decision of the Supreme Court in the *Cudahy* case and the view expressed by the Supreme Court in the *Mohawk* case as part of its discussion of the *Cudahy* case.

The third point made by the Court in the *Barnes* case (178 F. 2d 156, 159) is that Section 5, which, as noted above, gives authority to "prosecute any inquiry", includes the power to issue subpoenas. This is the equivalent of saying that because the Department of Justice can investigate possible violations of law or inquire into such violations, the Department of Justice can issue subpoenas. Also, Section 5 gives the board authority to make inquiries and if, as the *Barnes* case states, Section 5 includes the power to issue subpoenas, Section 11 would be super-

fluous. The fact is that Section 11 was obviously intended to cover the subpoena power specifically and Section 5 certainly was not so intended. We submit that the power to delegate as given in Section 5 regarding inquiries, not only does *not* give the power to delegate the issuance of subpoenas, but actually negates any such implication in Section 11, as the *Mohawk* case points out. (331 U. S. 111, 121.)

The fourth point of the Court in the *Barnes* case (178 F. 2d 156, 159) is that Section 6—the rule-making power—permits the Board to adopt a regulation authorizing a Regional Director or a Hearing Officer to issue subpoenas. Here again, the Court in the *Barnes* case, although it quotes the *Mohawk* case, fails to note that the Court in the latter case specifically stated that the rule-making power cannot serve as a source of delegation where the statute *by implication* withholds such power. (331 U. S. 111, 121.) We submit that in view of the other factors already noted, the reliance of the Court in the *Barnes* case on the rule-making power is entirely unjustified.

The fifth point of the *Barnes* case (178 F. 2d 156, 160) is that “the administration of the Act must be flexible”, and if the Board, or a member of the Board, were required to follow the terms of the statute and to issue the subpoena, the application for the subpoena would have to go to Washington and it would not be as easy or convenient for parties to obtain subpoenas. We submit that this is further evidence of the loose thinking of a type which has caused some Courts to give administrative agencies powers which were never intended by Congress, and which has permitted the bureaucratic processes to usurp functions which traditionally and properly should

be reserved to the Courts. Despite the *Barnes* case, we believe that the power to issue subpoenas is not analogous to the power of inquiry. It is a power which should not be given lightly. The *Cudahy* case put the matter into clear language when it said (315 U. S. 357, 363):

“Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer.”

If, as appears from the statute itself, as the Court in the *Barnes* case admits, and as appears from the legislative history, the statute provides that the Board or members of the Board shall issue the subpoenas, and the Board shall revoke subpoenas, what sort of an argument is it which justifies delegation on the basis of convenience. Members of the Board are appointed by the President with the advice and consent of the Senate. (Sec. 3(a) of the Act.) Presumably, the Board is a responsible agency and Congress apparently believed that when the very important subpoena power is given to an administrative agency, convenience is secondary to the fact that responsible persons must exercise the power—not merely any person who might be picked out by the Board. Essentially, the question on this point raised by the *Barnes* case depends upon the importance attached to the subpoena power. The Court in the *Barnes* case apparently regards this power as relatively unimportant.

The same sort of argument is made by the Court in the next, the sixth point, of the *Barnes* case (178 F. 2d 156, 160.) The Court says that if the power to issue the subpoena is not delegable, the power to revoke the

subpoena likewise is not delegable. That conclusion is exactly correct and is exactly what Section 11(1) says. The Court then states that every petition to revoke would have to be passed upon by at least three members of the Board, which would take so much time that the Board could not perform its other "more important duties." Again, we submit that this shows a lack of importance attached to the subpoena power by the Court. We think the Court can have no more important function than that of using the power of the United States to force the production of testimony by subpoenas.

Another factor which indicates the importance of the subpoena power is that, under Section 11(3) of the Act, if a witness is called and compelled to testify after he has claimed the privilege against self-incrimination, he is granted complete immunity from prosecution. In the hands of irresponsible persons, this power could prove dangerous.

The seventh point of the *Barnes* case (178 F. 2d 156, 160) is that the National Labor Relations Board had followed the practice of having subpoenas signed in blank and had delegated the power to issue subpoenas as early as 1941, that Congress must have been aware of this practice, and that Congress by amending Section 11 by the Labor Management Relations Act of 1947, impliedly approved the practice of the Board.

There are several answers to this argument. The first is that the rule stated by the Court applies only where the statute is ambiguous. An administrative agency cannot expand its powers under a statute by an administrative practice no matter how many times Congress acts to reenact or to amend such a statute.

The second answer is that when Congress, by action of the Conference Committee, deleted the authority to delegate the power to issue subpoenas as such power was originally set forth in the House Bill, H. R. 3020, and likewise deleted the authority to delegate the power to revoke subpoenas as originally contained in the same Bill, it is certainly clear that Congress did not intend the Board, or its members, to delegate either issuance or revocation. Whether or not Congress actually knew of the prior practice of the Board, we cannot say, but certainly the language and the legislative history indicate that Congress did not intend to approve any such administrative practice. Presumably, Congress did not feel the need to say to the Board "You cannot delegate", when the language was so clear. Furthermore, as the *Barnes* case points out, Section 11 was changed substantially by the 1947 amendment. Therefore, the argument of implied ratification by Congress of the Board's practice, is not applicable.

A third answer might be that Congress was aware of the *Cudahy* decision (1942) holding that the subpoena power under the Federal Trade Commission Act could *not* be delegated, and that by adopting language in Section 11 of the present act so similar to that of the Federal Trade Commission Act (15 U. S. C. A., Sec. 49), Congress, in 1947, impliedly ratified the *Cudahy* decision.

The eighth point of the *Barnes* case (178 F. 2d 156, 161) is that the action of the Board, or one of its members, in issuing a subpoena is only ministerial, whereas the action of the administrative agency in the *Cudahy* case was discretionary. We submit that when the issuance of the subpoena was made automatic, with the power

of revocation, the Congress might well have considered that this would make it even more important to have the power vested in responsible persons, such as the Board, or its members, rather than in unknown subordinates. Also, it should be noted that the agency issuing the subpoena must determine (a) whether there is a proceeding pending such as described in Section 11(1) and (b) whether the applicant is a bona fide party to the proceeding. This action is not ministerial. Also, the power to revoke obviously involves an additional amount of discretion, yet on the theory of the *Barnes* case, the power of revocation can also be delegated to any agent the Board wishes to designate. We submit that the issuance of subpoenas is not ministerial, but, in any event, we believe that the history of the protection of individual rights in this country, shows that the subpoena power is more important than the Court in the *Barnes* case considers and that administrative agencies should not be given the power lightly.

The ninth point of the case (178 F. 2d 156, 161) is that the *Cudahy* case is not in point because of several factors. First, the Court says, in effect, that Section 4(c) of the Fair Labor Standards Act is not as broad from the standpoint of delegation as Section 5 of the present Act. Section 4(c) of the Fair Labor Standards Act provides:

“The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.” (29 U. S. C. A., Sec. 204(c).)

Section 5 of the present Act, as already mentioned above, provides that:

“The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. . . .”

We submit that the distinction between Section 4(c) and Section 5 is a very weak argument for distinguishing the *Cudahy* case.

The Court also says that in the *Cudahy* case the Supreme Court emphasized that a provision authorizing delegation of the subpoena power had been eliminated when the Bill was in Congress. If the Court in the *Barnes* case had inquired, it might have discovered that a provision authorizing delegation was eliminated from the House Bill in the Conference Committee when the present Act was being adopted.

The *Barnes* case also states that in the *Cudahy* case the Supreme Court had stated that such Court was not then concerned with the practice of some of the agencies, including the National Labor Relations Board, of delegating the issuance, though not the signing, to subordinates. Does the Court in the *Barnes* case mean by this statement that if, in the *Cudahy* case, the subpoenas had been rubber-stamped in blank and given to subordinates to issue, as done by the National Labor Relations Board, that the Supreme Court in the *Cudahy* case would then have approved such issuance of the subpoenas? Such a position seems to be rather silly and not really worth

argument. As a matter of fact, the whole point of the *Barnes* case, up to this stage, is that the National Labor Relations Board *has* delegated the issuance of subpoenas. Its reference to the quotation from the *Cudahy* case is meaningless.

The tenth and last point of the *Barnes* case (178 F. 2d 156, 162) is that the *Mohawk* case is the most recent one involving this delegation problem, and the *Barnes* case says:

“All of the reasons assigned by the Supreme Court for sustaining the validity of the delegation of the subpoena power in the *Mohawk* case, apply to the instant case, except that the Act here did make expressly delegable certain powers other than the power to issue subpoenas.”

If further evidence of the weakness of the *Barnes* decision were needed, it is provided in this final comment. The fact is that of the points relied upon by the Supreme Court in the *Mohawk* case, every point but one leads to the conclusion that the *Cudahy* case applies here. The only point as to which the *Mohawk* case is similar to the present case is that in both the Emergency Price Control Act and the present Act, the administrative agency has the rule-making power. And, as the Court in the *Mohawk* case specifically stated, although this was disregarded by the *Barnes* case, the rule-making power cannot be relied upon for authority to delegate where Congress, by implication, has withheld such authority.

We submit that the argument of the Court in the *Barnes* case is replete with inaccuracies, inconsistencies and error. The Court (1) has overlooked Section 5 in the Court's reliance on Section 9(c)(1); (2) the Court

has misinterpreted Section 5, when it says that power includes the power to issue subpoenas; (3) the Court has greatly over-emphasized Section 6—the rule-making power—and has disregarded the language of the *Mohawk* case in this respect; (4) the Court's argument for flexibility of administration and ease of issuing and revoking subpoenas completely overlooks the importance of the subpoena power and the great need that such power be exercised by a responsible agency and not by every Tom, Dick and Harry, if individual rights are to be protected; (5) the Court's reliance upon the administrative practice prior to 1947 is clearly in error where the Act itself is specific, where Section 11 was revised, and where in conference the delegation provisions were eliminated; (6) the Court's attempt to distinguish the *Cudahy* case and the Court's reliance on the *Mohawk* case are in complete disregard of the actual decision in the *Mohawk* case.

We suppose it is obvious by now that we believe the *Barnes* decision to be one of the most superficial and poorly reasoned decisions to be handed down by a Court of Appeals. The other two cases cited by the Board from the Fifth Circuit—the *Edwards* case and the *Jackson Packing* case, *supra*, are meaningless, since the Court in these cases blindly relied upon the *Barnes* case without any analysis of the problem. We, therefore, submit that any true examination of this question can result in only one conclusion—the *Cudahy* case, as interpreted by the *Mohawk* case, is clearly applicable here and the *Barnes* case is clearly wrong.

The Board urges upon this Court that the Administrative Procedure Act vests Trial Examiners with subpoena powers co-extensive with those of the agency. The Board relies on Section 7(b) of the Administrative Procedure

Act as support for this proposition. As the Board states its legal position at page 10 of its Brief:

“We are not concerned with *implied* powers of delegability under the National Labor Relations Act but rather are concerned with an *express* conferment of subpoena powers on Trial Examiners under Section 7(b) of the Administrative Procedure Act.”

Let us examine Section 7(b) and determine whether there has been “express conferment” of subpoena powers upon Trial Examiners. Section 7(b) of the Administrative Procedure Act provides:

“* * * Officers presiding at hearing shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) *issue* subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.” (Emphasis added.)

The Board makes out an express conferment of the power to revoke subpoenas from the power given hearing officers to issue subpoenas, to rule upon offers of proof and receive relevant evidence, and to dispose of procedural requests or similar matters.

Not only does Section 7(b) not expressly confer the power to revoke subpoenas upon hearing officers, but we

respectfully submit that it in effect denies this power to hearing officers. Section 7(b)(2) authorizes hearing officers to issue subpoenas. That is the extent of the power given hearing officers under the Act. The Court is familiar with the principle of law that, where Congress has dealt specifically with a subject and granted certain powers, it is deemed to have withheld other powers. We contend that, when Congress only granted hearing officers the power to issue subpoenas, Congress intended to deny hearing officers the power to revoke subpoenas. We further contend that Congress intended that petitions to revoke subpoenas should be ruled upon by the agency itself or Courts of law.

The Board correctly states that in *N. L. R. B. v. International Typographical Union*, 76 Fed. Supp. 895, and in *N. L. R. B. v. Gunaca*, 135 Fed. Supp. 790, aff. 230 F. 2d 542, the District Courts held that Section 7(b) of the Administrative Procedure Act gives Trial Examiners of the National Labor Relations Board power to revoke subpoenas.

A reading of these decisions indicates that the Courts arrived at this decision under a so-called "rule of convenience", to wit, that, if the Trial Examiner did not have the power to revoke subpoenas, litigants could literally swamp the Board with petitions to revoke subpoenas and thereby "sabotage the function of the National Labor Relations Board." The decisions themselves recognize that there is no *express* conferment of the power to revoke subpoenas under the Administrative Procedure Act, but uphold an implied power by virtue of Section 7(b). We submit that the District Courts reached this result without giving sufficient consideration to the serious abuses which can, and have, arisen through the exercise

of the subpoena power. As the United States Supreme Court said of the subpoena power in the *Cudahy* case (315 U. S. 357, 363):

“It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer.”

Legislative history shows that Congress intended to make it easy for a party to obtain the issuance of a subpoena but require the agency itself or the Courts to rule upon petitions to revoke subpoenas. If Congress intended that hearing officers should have the power to revoke subpoenas, it could have said so in Section 7(b) of the Administrative Procedure Act. Congress did not do so. It simply granted hearing officers the power to issue subpoenas.

The Board asserts that, since the Board has, under its rule-making power, delegated authority to the Trial Examiners to revoke subpoenas, the power of the Board to issue such a rule cannot be questioned. However, Board rules can not have the effect of amending the law. An agency rule cannot change positive provisions of the statute. (*United States v. Gredzens*, 125 Fed. Supp. 867.) Section 11, National Labor Relations Act, and the legislative history thereof, clearly indicates that Congress intended that the Board itself exercise the subpoena power and that such power can not be delegated by rule or otherwise.

The Seventh Circuit's action in affirming *N. L. R. B. v. Gunaca*, *supra*, which upheld the power of Trial Examiners to rule on petitions to revoke, was based on the Seventh Circuit's earlier opinion in *N. L. R. B. v. Barnes*, *supra*. We have set out at length our reasons why the

Barnes decision was wrongfully decided, and, of course, the argument is equally applicable to the issue of the power to revoke subpoenas as it is on the power to issue subpoenas.

If, as we contend, Section 7(b) does not expressly confer subpoena powers on Trial Examiners, then the issue before this Court is whether or not the power to delegate subpoena powers to Trial Examiners can be implied under the National Labor Relations Act. For the reasons previously stated under this point, we assert that the power of delegability of the subpoena power can not be implied under the Act, since Congress expressly granted this power to the Board itself. The *Cudahy* case upholds our contention that delegability of the subpoena power can not be implied under the Act.

Under point IC (App. Br. pp. 15-20) the Board asserts that, apart from the Administrative Procedure Act, Trial Examiners have full subpoena powers. The Board relies entirely on the *Barnes* case, *supra*, to support this proposition. All of the issues raised by the Board have been previously disposed of in our discussion of the *Barnes* case. The *Edwards* case, *supra*, 189 F. 2d 970; and *Jackson Packing Co.* case, 204 F. 2d 842, simply cite the *Barnes* case, *supra*, and make no independent review of the issues. They stand or fall with the *Barnes* case.

In view of the foregoing, it is submitted that the Court below correctly ruled that the power to revoke subpoenas does not reside in Trial Examiners under either the Administrative Procedure Act or the National Labor Relations Act.

II.

All Subpoenas Here Involved Are Invalid Because They Were Issued Without a Proper Application Therefor.

Section 11(1) of the National Labor Relations Act provides that a subpoena shall be issued “upon application of any party to such proceedings.” Since the Board has seen fit to rely on the Administrative Procedure Act on the first issue, let us turn to the Administrative procedure Act on this issue for a definition of the word “party.” Section 2 of the Administrative Procedure Act defines the word in the following terms:

“‘Party’ includes any person or agency named or admitted as party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding.”

Section 6 of the Administrative Procedure Act provides:

“Agency subpoenas authorized by law shall be issued to any *party* upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought.” (Emphasis added.)

It is clear that under the Administrative Procedure Act, the General Counsel and Counsel for the General Counsel are not parties to this proceeding, since they have not been named or admitted as a party.

Section 102.58(c) of the Board’s Rules and Regulations provides that a subpoena shall be issued “upon application . . . in writing by any party.”

The term "party" is not defined in the Act, but it is defined in Section 102.8 of the Board's Rules and Regulations as follows:

"Sec. 102.8 Party.—The term 'party' as used herein shall mean the regional director in whose region the proceeding is pending, and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8(a)(1) or 8(a)(2) of the act; but nothing herein shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only."

In what appears to us to be an obvious confession of weakness, the Board in its Brief under this point nowhere referred to its own rules and regulations which define the term "party." The reason that the Board failed to quote Section 102.8 of its own rules and regulations is that the term "party" does not include the General Counsel.

If we assume that the Board's definition of "party", as set forth in Section 102.8 of its rules and regulations is correct, it is apparent that the applications for the subpoenas were not made by a "party" as required by the Act and by the regulations. The application for each subpoena was made by E. Don Wilson, described in the subpoena as "Counsel for the General Counsel."

Subpoenas issued pursuant to the request of an attorney for the General Counsel or an attorney for the Regional Director of the Board are not issued upon application of a "party" to the proceeding and must be quashed as invalid. (*N. L. R. B. v. Pesante*, 119 Fed Supp. 444; *N. L. R. B. v. Duval Jewelry Co.*, 141 Fed. Supp. 860.)

The Board in its Brief argues that pursuant to Section 3(d) of the Act, the General Counsel is the prosecutor or unfair labor practice complaints and is, therefore, a party to the proceeding. The Board, however, ignores the fact that Section 3(d) vests in the General Counsel "final authority, *on behalf of the Board*, in respect to . . . the prosecution of complaints." (Emphasis added.) The General Counsel is the attorney for the Board in prosecuting unfair labor practice complaints. The Board is a party to this proceeding. The General Counsel is no more a party to this proceeding than would be the District Attorney in a proceeding brought on behalf of the People of the State of California.

The statement by the Board in its Brief at pages 22 and 23 that if the General Counsel does not have the power to apply for subpoenas, then it is without power to investigate or compel the attendance of witnesses, has no substance whatsoever. The General Counsel can obtain the issuance of a subpoena in unfair labor practice proceedings simply by having any member of the Board apply for the subpoena or by having the charging party apply for the subpoena.

The case of *N. L. R. B. v. Kingston Trap Rock Co.*, 222 F. 2d 299, relied upon by the Board, is completely inapposite. The case simply involved the question as to whether or not associate general counsel had the power

to investigate charges against an employer after the term of the General Counsel of the Board had expired. Further than that, the *Kingston Trap Rock* case involved a subpoena issued by the Regional Director who is defined as a "party" under the Board's regulations. This case involves the power of counsel for the General Counsel to apply for a subpoena.

It is clear that the General Counsel is not a party as defined in the Act, or the Board regulations; even if the General Counsel were a proper party, which he is not, there is nothing in the Act or in the regulations which authorizes him to delegate his authority to make application for subpoena to one of his subordinate employees.

Conclusion.

For the reasons stated, we submit that each subpoena is invalid and that the order of the District Court refusing to enforce said subpoenas should be affirmed.

Respectfully submitted,

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No. 15310

**In the United States Court of Appeals
for the Ninth Circuit**

SUNLAND INDUSTRIES, INC., a Corporation, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALI-
FORNIA**

BRIEF FOR THE APPELLEE

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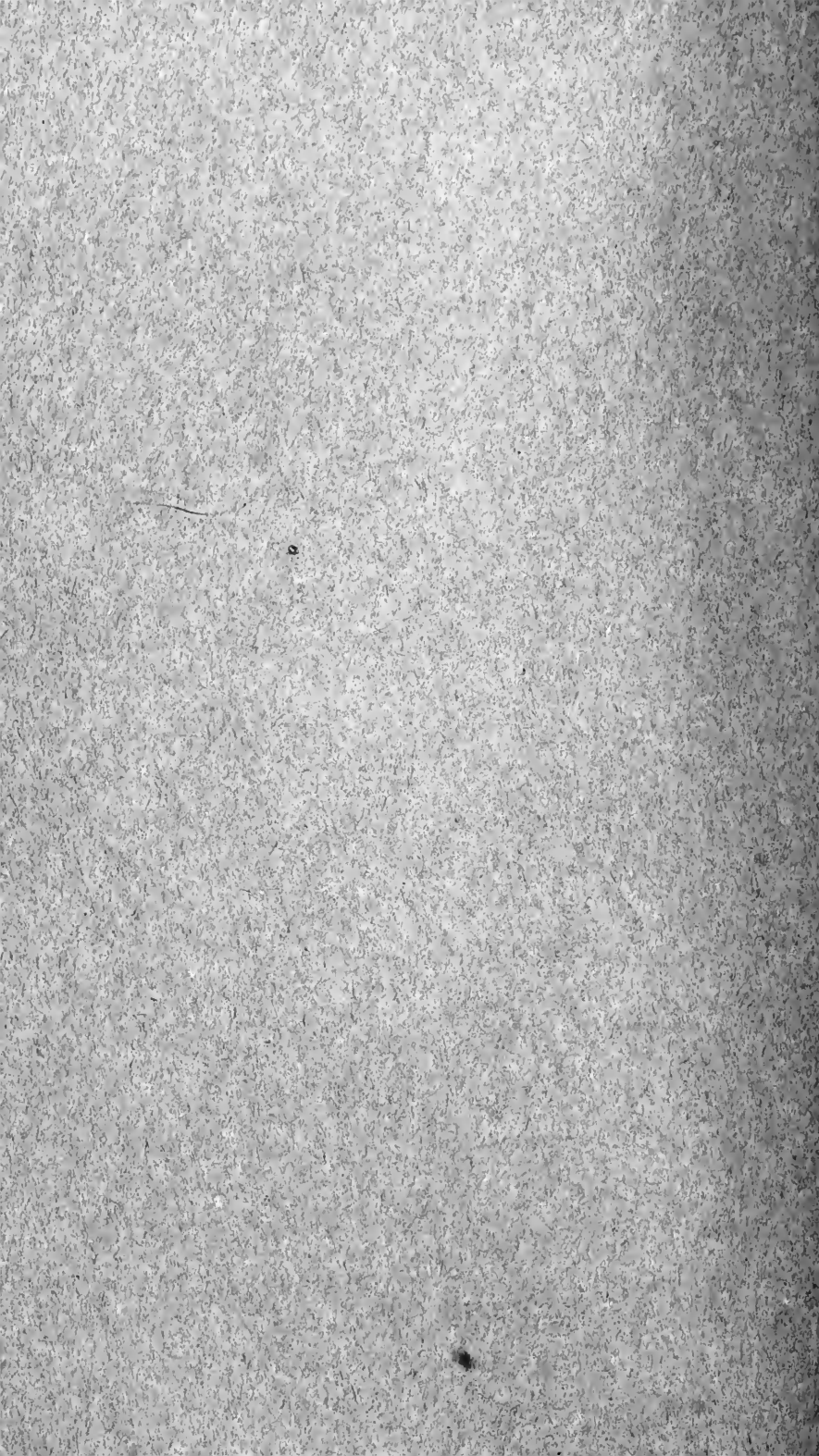
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DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALI-
FORNIA*

BRIEF FOR THE APPELLEE

OPINION BELOW

The findings of fact and conclusions of law of the District Court (R. 46-56) are not officially reported.

JURISDICTION

This appeal involves federal excess profits taxes for the year 1943, with interest, in the amount of \$78,130.71. The taxes in dispute were paid on December 14, 1949. (R. 5, 34.) Claim for refund was filed on December 23, 1949 (R. 5, 35) and was rejected (R. 35-36). Within the time provided in Section 3772 of the Internal Revenue Code of 1939 and on May 1, 1952, the taxpayer brought an action in the District

Taxpayer filed consents extending to June 30, 1949, the time for assessment for 1943. (R. 49.) By letter dated December 1, 1949, taxpayer was advised by the Internal Revenue Agent in Charge, San Francisco, that a constructive average base period net income of \$32,958.62 was being allowed for the years 1941, 1942, 1943 and 1945. (R. 50.) This was far less than the amount claimed by taxpayer in its application for relief for 1943, filed in 1946, and meant that any claim for relief under Section 722 was denied in full for 1943. (R. 51.) On December 14, 1949, in order to stop the running of interest, taxpayer paid a deficiency of \$55,989.09 in excess profits tax for 1943, plus interest of \$19,316.23 (R. 49), accompanied with a statement to the effect that taxpayer did not waive its right to claim that such payment was untimely (R. 50). Taxpayer duly filed a claim for refund of this payment. (R. 49.)

On January 23, 1950, the Excess Profits Tax Council approved the finding of the Internal Revenue Agent in Charge relating to the determination of taxpayer's constructive average base period net income. (R. 53.) The deficiency in excess profits tax for 1943, and interest, was assessed on the January, 1950, list. (R. 49.) The statutory notice of deficiencies was sent by the Commissioner to the taxpayer on April 6, 1950. (R. 50.)

In this proceeding taxpayer claims that the assessment was untimely, being barred by the three-year statute of limitations of Section 275(a) of the Internal Revenue Code of 1939, as extended to June 30, 1949, by consents filed under Section 276(b). The court below held that the assessment was timely, falling within the provision of Section 701(a)(5) that any amount of tax

remaining unpaid under that paragraph in excess of the reduction in tax finally determined under Section 722 may be assessed at any time before the expiration of one year after such final determination. (R. 54-55.)

SUMMARY OF ARGUMENT

I

Under Section 710(a)(5) of the Internal Revenue Code of 1939, a taxpayer who files a claim for relief for excessive profits taxes under Section 722 may defer payment of excess profits tax equal to 33 per cent of the reduction claimed until determination of his claim for relief. The Commissioner has one year after the final determination of the claim for relief to assess the amount of the deferment as to which the taxpayer has not obtained relief.

Taxpayer here by an informal claim on its 1943 excess profits tax return claimed relief under Section 722 and deferred a part of its tax for that year. Although the claim was formally defective in not complying with the Regulations, the Commissioner treated it as an effective informal claim and taxpayer perfected it by filing a formal claim. Taxpayer now claims that the Commissioner lacked power to waive the formal defects.

It is completely settled, however, by Supreme Court decisions, that the Commissioner has the power to waive his procedural Regulations, and that a course of departmental action such as occurred here is such a waiver.

II

Taxpayer, having filed an informal claim and treated it ^{as} one subject to perfection by the filing of a formal claim, cannot now deny its effectiveness. Having enjoyed the benefits of the deferment it cannot now say that the deferment was erroneous and that the section of the statute which it successfully invoked was inapplicable. To permit it to do so would be for the courts to assist the taxpayer in taking advantage of its own wrong.

III

The District Court announced its decision prior to receipt of taxpayer's reply brief. Thereafter it fully reconsidered the matter, and its findings of fact, conclusions of law, and judgment were issued after that reconsideration. Again, on motion for new trial it once more reviewed the matter. Under these circumstances there was clearly no reversible error.

ARGUMENT

I

The Commissioner of Internal Revenue Had the Power to Treat the Informal Claim on Taxpayer's 1943 Return, Perfected by the Timely Filing of a Formal Claim, as a Properly Filed Claim

Section 722 of the World War II Excess Profits Tax Act, added by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, and amended by Section 222, Revenue Act of 1942, c. 619, 56 Stat. 798, provides that in any case in which a taxpayer establishes that the tax otherwise computed results in an excessive and discriminatory tax and establishes what would be a fair

and just amount representing normal earnings to be used as a constructive average base period net income for excess profits tax purposes, the tax shall be determined by using such constructive average base period net income. It authorizes the taxpayer to apply for an administrative determination that he is entitled to relief.

If he is granted relief under Section 722 such as to entitle him to a refund, Section 3771(g) of the Code, added by Section 2, Act of December 17, 1943, c. 346, 57 Stat. 601, limits his right to interest on the refund. Therefore, the relief granted by Section 722 is insufficient to compensate him, pending the administrative determination of his application, for the loss resulting from the withholding of money he is eventually entitled to have returned. Accordingly, to guard against this potential loss Section 710(a)(5) (Appendix, *infra*) enables the taxpayer to retain the use of one-third of the Section 722 reduction for which he has applied, pending the administrative determination. See *Squire v. Puget Sound Pulp & Timber Co.*, 181 F. 2d 745 (C.A. 9th).

As originally enacted by Section 222(b) of the Revenue Act of 1942, *supra*, Section 710(a)(5) was silent as to the relationship of this section to the statute of limitations. If the Commissioner were to assess a deficiency for the amount deferred withⁱⁿ the general three-year period of limitations but prior to final determination of the application for relief under Section 722, he would render the relief provided by Section 710(a)(5) ineffective. *California Vegetable Concentrates, Inc. v. Commissioner*, 10 T.C. 1158.

By Section 3 of the Joint Resolution of June 12, 1948, c. 459, 62 Stat. 387, Congress added the provision, effective retroactively, that—

Notwithstanding any other provision of law or rule of law, to the extent that any amount of tax remaining unpaid pursuant to this paragraph is in excess of the reduction in tax finally determined under section 722, such excess may be assessed at any time before the expiration of one year after such final determination.

It is the application of that provision which is in controversy here.

There is here no dispute as to the amounts in question, nor as to the date of the final determination, nor as to the fact that the deficiency was assessed within the time limits of this provision, if it is applicable. See *Hardaway Motor Co. v. Commissioner*, 207 F. 2d 872 (C. A. 5th); *Tribune Publishing Co. v. Commissioner*, 17 T. C. 1228. Taxpayer's argument, as we understand it, is that it did not comply with the procedure set out in the Regulations for claiming Section 710(a)(5) deferment, and was not entitled to the benefits of that section. Since, although it actually received the benefit of deferment, it was not entitled to do so, the section was not really applicable at all. Since the section was inapplicable, the extended statute of limitations contained therein was inapplicable.

Section 35.710-5 of Treasury Regulations 112 provides in part that a taxpayer claiming deferment under Section 710(a)(5) must, at the time of filing its excess profits tax return, attach thereto an application for relief under Section 722 in Form 991:

The application must set forth under oath each ground under section 722 upon which the applica-

tion for relief is based and facts sufficient to apprise the Commissioner of the exact basis thereof and to establish eligibility for relief, as well as data and information in sufficient detail to establish the amount of constructive average base period net income claimed, the amount of tax reduction claimed, by the use of section 722, and the amount of tax deferment claimed on the return. In any case in which an application for relief on Form 991 (revised January, 1943) is not so attached to the excess profits tax return, the taxpayer shall not be deemed to have claimed on its return the benefits of section 722.

Taxpayer on or about September 15, 1943, had filed, on Form 991, an application for relief under Section 722 for its taxable year 1942. (R. 19, 71-75) It did not attach a Form 991 to its return for 1943, the year here involved. On its excess profits tax return for that year (R. 63-66), under Item 17, "Amount deferred by reason of the application of section 710(a)(5) (relating to abnormality under section 722) (attach schedule)" it wrote in "in accordance claim on file 1942 * * * \$63,768.68" (R. 63), referring to the foregoing application for relief filed on September 15, 1943 (R. 19). Subsequently, on March 12, 1946, prior to the expiration of the general statute of limitations for assessing deficiencies in excess profits tax for the year 1943, taxpayer filed a claim for relief under Section 722 for the year 1943, using Form 991. (R. 20, 77-81.)

It is obvious that the notation under Item 17 of the 1943 return, defective though it was, was intended as a claim for relief under Section 722 and as a claim of a right to defer payment of a portion of the tax under

Section 710(a)(5). It was defective in not having attached Form 991, and erroneous in misconstruing the amount of tax which taxpayer was entitled to defer. Nevertheless it was a claim and can be construed to be nothing less than an informal claim.

It is equally obvious that it was so treated by the Commissioner. The remaining liability shown on the return was assessed and collected prior to July 1, 1949 (R. 17), the date to which the time for assessing tax liability had been extended by consents filed under Section 276(b) (R. 25, 26). Adjustments to this amount had been suggested by Revenue Agents. (R. 17.) The tax return had been audited prior to May 25, 1948 (R. 27), and the Revenue Agent's report referred to the deferment (R. 28). An internal memorandum of December 9, 1948, also referred to the Section 710(a)(5) deferments. (R. 29.)¹

The notation on the return was intended as a claim, and was later perfected by a formal claim. The Commissioner in fact treated it as a valid though informal claim. Accordingly we come down to the question whether the Commissioner had the power to treat this informal claim as a proper claim entitling taxpayer to defer payment of a portion of its excess profits tax.

There is, however, no real question as to this. It has been thoroughly settled by Supreme Court decisions that the Commissioner does have such power. Indeed the decisions go far beyond the issue presented in this case, to hold that the Commissioner not only has the power but has validly exercised it even in cases where

¹ These facts are stipulated. Taxpayer (Br. 22) objects to use of the facts on pages 27-29 of the record to show an estoppel. However reference to them to show what the Commissioner in fact did is clearly within the terms of the stipulation.

the formal claim has been filed after the expiration of the statute of limitations.

The Court in *United States v. Felt & Tarrant Co.*, 283 U. S. 269, 273, stated that compliance with formal requirements "may be dispense with by waiver, as an administrative act," citing *Tucker v. Alexander*, 275 U. S. 228. In *United States v. Garbutt Oil Co.*, 302 U. S. 528, 533, in holding that an amendment of a claim by setting out new grounds was in effect a new claim, barred because the amendment was made after the statute of limitations had run, the Court distinguished between the Commissioner's lack of power to disregard the statutory mandate and "his undoubted power to waive the requirements of the Treasury regulations." Referring to *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, the Court said (302 U. S. 528, 533):

In the cited case, and others decided about the same time, we held that, while the Commissioner might have enforced the regulation and rejected a claim for failure to comply with it in omitting to state with particularity the grounds on which the claim was based, he was not bound to do so, but might waive the requirement of the regulation and consider a general claim on its merits.

See also, *Bonwit Teller & Co. v. United States*, 283 U. S. 258; *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62; *Bemis Bro. Bag Co. v. United States*, 289 U. S. 28; *Moore Ice Cream Co. v. Rose*, 289 U. S. 373; *Angelus Milling Co. v. Commissioner*, 325 U. S. 293, 297, 298. See also *Abe M. Katz Co. v. United States*, 193 F. 2d 510 (C. A. 5th), dealing with a claim filed under Section 710(a)(5), where it was assumed

that a claim filed at some time after filing the return, and then returned for corrections of defects, was a valid claim.

The cases cited by taxpayer (Br. 10-11, 14) are readily distinguishable. The Regulations involved in *Helvering v. Wilshire Oil Co.*, 308 U. S. 90; *Douglas v. Commissioner*, 322 U. S. 275, and *Guanacevi Mining Co. v. Commissioner*, 127 F. 2d 49 (C. A. 9th), dealt with substantive, not procedural, matters, which also were not waived by the Commissioner. *Lucas v. Pilliod Lumber Co.*, 281 U. S. 245, held that formal requirements set out in the statute, not in Regulations, may not be waived by the Commissioner. In *Commissioner v. Lane-Wells Co.*, 321 U. S. 219, the Commissioner was insisting upon, not waiving, the requirements of the Regulations.²

II

Taxpayer, Having Obtained the Benefits of an Informal Claim, May Not Now Assert That It Was Ineffective

Taxpayer (Br. 17-27) objects to the finding of the District Court (R. 53-54) that —

The reference to the 1942 claim together with the taxpayer's own course of conduct served to mislead the Commissioner to the extent that the taxpayer should not be allowed to take advantage of any error on the Commissioner's part.

and to the corresponding conclusion of law (R. 55).

² If it be argued that the decisions have involved cases where the taxpayer has attempted to establish a waiver, whereas here it is the Commissioner, we do not see how the Commissioner's power to waive procedural requirements is less when he is claiming the power than when it is being forced on him.

In the first place, taxpayer argues that what was involved here was no more than in the ordinary statute of limitations case, where a taxpayer has omitted something or made an error in his return, and that such omissions or errors do not lead to an estoppel. (Br. 17-21.) This argument, however, misunderstands the issue. The question is not whether taxpayer was or was not in fact entitled to relief or whether it was in fact entitled to deferment of the *amount* of tax it withheld. The question is whether taxpayer was representing that it was making a *claim* for relief, from which would follow its right to defer payment of a part of the tax. It clearly was doing this.

As the findings and conclusions of the court below hold, the reference to the 1942 claim and its course of conduct served to mislead the Commissioner. Included in that course of conduct was the subsequent filing of the formal claim for relief on Form 991. The notation on the 1943 excess profits tax return in the space provided for claims for deferment under Section 710(a)(5), the entry of an amount deferred, the reference to the 1942 claim for Section 722 relief, the subsequent perfecting of the informal claim, all were a representation to the Commissioner that taxpayer was claiming relief under Section 722 and was asserting the corresponding right to defer part of the tax under Section 710(a)(5). This was a representation as to taxpayer's then state of mind, its belief that it had a valid claim.

If taxpayer intended, after the expiration of the general statute of limitations, with the Commissioner not having assessed a deficiency in the amount deferred, to deny the effectiveness of its claim and

dispute its right to defer payment, that was a fact which the Commissioner had no means of discovering, being solely within taxpayer's knowledge. As matters apparently stood, with a claim on file which taxpayer and Commissioner alike treated as valid, the Commissioner could not assess a deficiency until final determination of the claim for Section 722 relief. *California Vegetable Concentrates, Inc. v. Commissioner*, 10 T. C. 1158.

Taxpayer by its actions represented that it had a claim sufficient to justify deferment under Section 710 (a)(5). It in fact did have such a claim, the informality having been disregarded by the Commissioner. The Commissioner acted upon the basis of a claim having been filed by taxpayer. Taxpayer's argument now is that the representations implicit in its conduct were false, and that it did not in fact have a valid claim. This is not a case of error in the factual details of a claim, but one of denying the existence of any claim. We submit that the court below properly held that taxpayer cannot be allowed to take advantage of any error on the Commissioner's part (R. 54, 55), although as we have stated in Point I, we do not believe that the Commissioner made any error. However, if it be held that the Commissioner should have assessed the deficiency prior to July 1, 1949, it is clear that his failure to do so resulted from taxpayer's representation that it was claiming relief under Section 722, and that for taxpayer now to deny that it had a claim would be for it to take advantage, not of its error, but of its wrong.

In the second place taxpayer argues that the court was precluded from considering the foregoing

because technical estoppel was not pleaded as an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure. (Br. 20-24, 29-30.) Taxpayer asserts that the reasons why it must be affirmatively pleaded are that the defendant must plead and prove each element of a recognized defense and that a plaintiff must be given an opportunity to present evidence contradicting the effect of the purported defense. (Br. 22.)

We respectfully submit that the facts of this case do not call for the strict application of Rule 8(c), and that the failure of the court below to hold that the answer must contain a section entitled “Affirmative Defense” is, if error, at most harmless error. There was no surprise to the taxpayer or doubt as to the contentions of the Government. The conclusion that there was an estoppel followed as a matter of law from the stipulated facts (R. 18, 20),³ and taxpayer does not even now suggest what additional evidence could be available, or in fact that there is anything further it could say to strengthen its position. In this situation Rule 8(c) should be construed in the light of the admonition in Rule 1 that the rules “shall be construed to secure the just, speedy, and inexpensive determination of every action.”

Furthermore, it is up to the taxpayer to establish his

³ Further facts supporting the result below are set out in Paragraph VII of the Stipulation (R. 26-33), which taxpayer asserts may not be considered for this purpose. While we believe that the terms of the stipulation (R. 26-27) are broad enough to permit their consideration, the uncontested parts of the stipulation furnish sufficient support for the court’s conclusion.

right to a refund. In language quoted in *Lewis v. Reynolds*, 284 U. S. 281, 283—

the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax. The action to recover on a claim for refund is in the nature of an action for money had and received, and it is incumbent upon the claimant to show that the United States has money which belongs to him.

See also *Roybark v. United States*, 218 F. 2d 164 (C. A. 9th). There is no dispute here as to the fact that the amount paid represented taxpayer's correct tax liability.

Finally, although the elements of estoppel are present, we believe that the court's Conclusion IV also reflects a more fundamental principle than that of technical estoppel—the principle that the courts will not lend their aid to the perpetuation of a wrong. “The plaintiff cannot be permitted to found its claim upon his own inequity or to take advantage of its own wrong.” (R. 55.)⁴ See *Stearns Co. v. United States*, 291 U. S. 54, 61-62.

III

The District Court's Announcement of Its Decision Prior to Receipt of Taxpayer's Reply Brief, Where the Matter Was Then Fully Reconsidered, Was, at Most, Harmless Error

Taxpayer objects that the court below announced its decision prior to receipt of taxpayer's reply brief. (Br. 27-29.) Although it appears that counsel were advised

⁴ Although not directly involved here, the congressional policy against a change of position by either taxpayer or Commissioner is reflected in Sections 1311-1314 of the Internal Revenue Code of 1954.

by the clerk that the court had decided the case on March 23, 1956 (R. 39-40, 45-46), prior to receipt of taxpayer's reply brief on March 27 (R. 40-41), the error, if it was error, was harmless.

Subsequent to that time, and before final judgment, the court considered the arguments presented by taxpayer. Its order of April 16, 1956, overruling taxpayer's objection to introduction of evidence specifically refers to the reply brief. (R. 44.) A supplemental stipulation of facts was filed on May 2. (R. 45-46.) The findings of fact, conclusions of law, and judgment were not filed until April 18. (R. 46-56.) On June 1, the court granted in part and denied in part taxpayer's motion to amend and supplement the findings of fact and conclusions of law. (R. 57-59.) On the same day the court, having considered the files, the evidence, the memoranda and argument of counsel, denied taxpayer's motion for a new trial. (R. 59.)

On this record it is clear that taxpayer, before final decision, was granted a full opportunity to present its arguments to the court, and that it was not prejudiced by the court's first action. Certainly there has been shown no such abuse of the trial court's discretion in the manner of conducting its business as to call for supervisory action by this Court. Too, it is not clear just what action by this Court taxpayer is requesting, since upon a remand there is nothing additional for the District Court to consider which was not before it before it rendered its judgment.

Finally, taxpayer suggests that since the facts were stipulated this Court is free to disregard the findings of the District Court. (Br. 30-31.) We do not know which findings taxpayer wishes to have disregarded,

but in any event the rule so asserted is subject to the qualifications expressed by this Court in *Randall Foundation, Inc. v. Riddell*, decided January 18, 1957, (1957 P-H, par. 72,429) and *Rollingwood Corp. v. Commissioner*, 190 F. 2d 263.

CONCLUSION

The decision of the court below is correct. It should be affirmed.

Respectfully submitted,

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MARCH, 1957.

APPENDIX

Internal Revenue Code of 1939:

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT
AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(26 U.S.C. 1952 ed., Sec. 275.)

SEC. 276. SAME—EXCEPTIONS.

* * * * *

(b) *Waiver.*—Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

* * * * *

(26 U.S.C. 1952 ed., Sec. 276.)

SEC. 710 [as added by Section 201, Second Revenue Act of 1940, c. 757, 54 Stat. 974]. IMPOSITION OF TAX.

(a) *Imposition.*—

* * * * *

(5) [as added by Section 222(b), Revenue Act of 1942, c. 619, 56 Stat. 798, and amended by Section 3(a), Joint Resolution of June 12, 1948, c. 459, 62 Stat. 387] *Deferment of payment in case of abnormality.*—If the adjusted excess profits net income (computed without reference to Section 722) for the taxable year of a taxpayer which claims on its return, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, the benefits of Section 722, is in excess of 50 per centum of its normal tax net income for such year, computed without the credit provided in Section 26(e) (relating to adjusted excess profits net income), the amount of tax payable at the time prescribed for payment may be reduced by an amount equal to 33 per centum of the amount of the reduction in the tax so claimed. For the purposes of Section 271, if the tax payable is the tax so reduced, the tax so reduced shall be considered the amount shown on the return. Notwithstanding any other provision of law or rule of law, to the extent that any amount of tax remaining unpaid pursuant to this paragraph is in excess of the reduction in tax finally determined under Section 722, such excess may be assessed at any time before the expiration of one year after such final determination.

* * * * *

(26 U.S.C. 1952 ed., Sec. 710.)

No. 15,310

IN THE

United States Court of Appeals
For the Ninth Circuit

SUNLAND INDUSTRIES, INC.,
a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Petition for Review of Decision of United States District Court
for the Southern District of California,
Northern Division.

APPELLANT'S PETITION FOR A REHEARING.

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No. 15,310

IN THE

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SUNLAND INDUSTRIES, INC.,
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Appellant,

VS.

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Appellee.

**On Petition for Review of Decision of United States District Court
for the Southern District of California,
Northern Division.**

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable Clifton Mathews, William Healy
and Stanley N. Barnes, Judges of the United
States Court of Appeals for the Ninth Circuit:*

Petitioner, on the grounds following, petitions for rehearing of the Court's judgment affirming judgment of the District Court.

1. THE COURT ERRED IN AFFIRMING JUDGMENT UPON THE BASIS THAT THE COMMISSIONER HAD THE POWER TO WAIVE THE REQUIREMENTS OF THE REGULATIONS BECAUSE THE REGULATIONS WERE MERELY A RESTATEMENT OF THE STATUTE. THE HOLDING OF THE COURT IS THUS THAT THE COMMISSIONER HAD THE POWER TO OVERRIDE AND DISREGARD A CONGRESSIONAL MANDATE, AND SUCH HOLDING VIOLATES ART. I, §1 OF THE U.S. CONSTITUTION AND CAUSES SERIOUS DOUBT TO BE CAST UPON THE VALIDITY OF THE EXCESS PROFITS TAX LAW.

As the Court will recall, the section of the statute involved in this case is § 710(a)(5)¹ of the excess profits tax law. This section was a special relief provision, applicable to only a relatively few corporate² taxpayers, and providing that under certain circumstances those who qualified under it could defer payment of a portion (only) of their excess profits tax. The statute clearly stated what a taxpayer was required to do in order to take advantage of this special privilege: (1) *it must* claim relief *on its regular return*, (2) the claim on the return *must* be made *in accordance* with the Commissioner's regulations. In view of the fact that a taxpayer who fulfilled the requirements of the section was allowed to defer a portion of its tax, § 710(a)(5) contained its own 'built in' statute of limitations. This special statute of limitations applied *only* to amounts of tax which remained unpaid "*Pursuant to . . .*" (the section) (Emphasis added).

¹The excess profits tax referred to was a tax imposed by subchapter E of chapter 2 of the Internal Revenue Code of 1939. (Slip Opinion, page 1.) § 710(a)(5) [26 U.S.C. § 710(a)(5)] is quoted Slip Opinion, pages 2 and 3.

²The excess profits tax applied to corporations only.

There is no question but that the Commissioner had to know, and did in fact know, that Petitioner deferred \$65,000³ of its tax; that taxpayer had failed to make a valid claim on its return; and that taxpayer had not even approximated compliance with the regulations (and, *a fortiori*, the statute⁴). The Commissioner acknowledges that he knew, but claims that he intentionally 'waived' petitioner's noncompliance with the law. The Government concedes that the issue we must eventually come down to is whether the Commissioner had the authority to do this⁵ (Gov't brief, 10). Petitioner submits that the holding of this Court that he did have such power, directly or indirectly, violates Art. I, § 1 of the U.S. Constitution which provides in part that, "All legislative powers herein granted shall be vested in a Congress. . . ." See also, *Hawke v. Comm'r*, 190 F. (2d) 946 (C.A. 9th, 1940). The Commissioner apparently concedes, as he must, that he does not have the power to disregard a Congressional statute (Gov't brief, 11); and at the same time, concedes that he did.

Petitioner submits that § 710(a)(5) itself, and for good reason, clearly supports its position that the Commissioner not only did not, but was specifically foreclosed from, exercising such power; that Congress

³For convenience all figures have been rounded off to the nearest \$5,000.

⁴The case was submitted on briefs, the facts were all stipulated and are in the record. The record hereinafter abbreviated "R".

⁵This is because if the Commissioner did not have such power the tax was not deferred pursuant to § 710(a)(5) and was thus subject to the regular statute of limitations [26 U.S.C. 275(a) and 26 U.S.C. 276(b)] which had expired.

not only did not intend to give him such power, by implication or otherwise, but on the contrary took *particular care* to make certain that such power could not be implied.

As is obvious from the section, Congress left the details of the *form* of the information etc. which the taxpayer must submit to the discretion of the Commissioner, and it specifically authorized the issuance of regulations for this purpose. But in the same section the Congress nevertheless saw fit to *clearly spell out* the fact that the necessary information to substantiate a taxpayer's claim must be made *in accordance* with the regulations and *must be made on the regular return*. This requirement was clearly not left to the discretion of the Commissioner. It is petitioner's contention that the part of the regulation⁶ which stated that if sufficient and satisfactory information was not submitted with taxpayer's return then the taxpayer automatically forfeited his right to any deferment and the entire tax became immediately due and payable, *was nothing more* than a restatement of the requirements of the statute.

Petitioner submits that the reasons why Congress was so deliberate was that any other course would have subjected the excess profits tax law to vulnerability of attack on DUE PROCESS grounds⁷ because:

⁶§35.710-5 of Regulations 112; quoted in opening brief for appellant, appendix iv.

⁷The words DUE PROCESS are intended to refer to the DUE PROCESS CLAUSE of the Fifth Amendment to the U.S. Constitution.

(1) The general rule that applied to the majority of taxpayers was that they had to pay their *entire tax* and the only remedy was to *subsequently* file for a refund (Sen. Finance Comm. rpt. on 1942 Bill).

(2) Because of the very nature of the law it was quite probable that many taxpayers would be entitled to refunds. The Code, however, limited the right to refund which might be found owing to taxpayer, and thus did not adequately compensate him for the loss of the use of his money. *Squire v. Puget Sound Pulp & Timber Co.*, 181 F. (2d) 745 (C.A. 9th, 1950).

(3) Since this could work a hardship and discriminate, particularly against taxpayers whose excess profits tax was an extremely high percentage of normal income, Congress provided in § 710 (a)(5) that if a taxpayer's excess profits tax was so high that it exceeded 50% of its normal tax net income, then taxpayer could defer a percentage⁸ of its tax under certain rigid circumstances (Sen. Finance Comm. rpt. on 1942 Bill).

(4) The section thus discriminated in favor of a comparatively small group of taxpayers but such discrimination was reasonable because the amount of the deferment was carefully considered to allow the taxpayers in this special

⁸33% of the reduction in the tax to which taxpayer claimed he was entitled. Petitioner's return (R. 63) indicates that one of the errors it made was to multiply 33% by line 16 (the wrong line) to arrive at the figure of \$63,768.68 (the amount improperly deferred).

category the privilege of retaining only enough of their tax as was deemed by Congress to be reasonable compensation for the potential hardship to which they might otherwise be subjected. *Squire v. Puget Sound Pulp & Timber Co., supra.*

(5) If Congress had allowed these special category taxpayers to defer more than a 'reasonable' amount of tax, while at the same time requiring the majority of taxpayers to pay immediately and seek refund later, then it seems probable that the excess profits tax law would have been vulnerable to attack on DUE PROCESS grounds.

(6) Congress therefore carefully spelled out the special circumstances under which a taxpayer was entitled to claim the benefits of the section. Whether a taxpayer was so entitled had to be determined at the time it filed its return or else everyone would have been able to defer. And even though it was determined that a taxpayer was in the special category the AMOUNT which it was entitled to defer had to be immediately determinable in order to insure that the statute had been complied with. For if the statute could have been construed to allow these special category taxpayers to defer all of their tax, or any other arbitrary amount, or if it had not been surrounded with sufficient safeguards to insure that only the 'reasonable' statutory amount had in fact been deferred, then the statute would have been vulnerable to attack, as suggested above.

A cursory glance at the Commissioner's regulations,⁹ with particular attention to their tenor, would seem to indicate that the Commissioner fully understood all of the aforementioned implications; that he understood that there was a Constitutional limit to the amount of tax which a special category taxpayer could be allowed to defer; and that he understood that a 'reasonable amount' had been defined by Congress.

Petitioner submits that amounts not deferred pursuant to the statute, as in the case at bar, were subject solely to the regular statute of limitations. Not only is the language of § 710(a)(5) perfectly clear in this respect, but any other interpretation could only mean that the section somehow permitted a taxpayer to defer more than a reasonable amount and was thus arbitrary. Petitioner submits that Congress would not have had the power to so legislate even if it had attempted as much.

2. THE COURT ERRED IN HOLDING THAT THE COMMISSIONER HAD THE POWER TO TREAT THE INFORMATION FILED TWO YEARS LATER AS THOUGH IT HAD BEEN SUBMITTED WITH THE ORIGINAL RETURN.

For the reasons stated above, Petitioner does not believe that Congress itself, in the premises, would have had the power to allow a taxpayer to defer

⁹§35.710-5 of Regulations 112.

\$65,000 and then wait two years before receiving information from the taxpayer which would substantiate the deferment; and this is particularly true where the belated information would only have authorized a maximum deferment of \$15,000. At the time the 'corrected return' finally reached the hands of the Commissioner the regular statute of limitations still had one year to run, and the 'corrected return' showed the following information:¹⁰

Amount allowed to be deferred by	
statute	\$15,000
Amount deferred by taxpayer	\$65,000
	<hr/>
Difference	\$40,000

Conceding that the Commissioner had the power to treat the information filed two years later as if it had been attached to the original return, this Court, by holding that the Commissioner could set aside the statute of limitations as to this \$40,000, squarely held that the Commissioner, directly or indirectly, had the power to disregard the Congressional mandate.

3. THE COURT ERRED IN HOLDING THAT PETITIONER HAD NO RIGHT . . . TO PROFIT BY ITS NONCOMPLIANCE.

Petitioner is not certain whether this statement by the Court was intended as a basis for the holding,

¹⁰The original return is at page 63(R). The Form 991 filed in 1946 is at page 78(R).

but for purposes of this petition it will assume that it was.

Petitioner interprets the Court's statement to mean that as the result of its mistake of law,¹¹ and because it derived a benefit from that mistake, taxpayer now is estopped to argue that the statute of limitations expired and it must consequently give up to the Commissioner any benefit which it might have derived as a result of that noncompliance.

In *Van Antwerp v. United States*, 92 F. (2d) 871 (C.A. 9th, 1937), the Commissioner used a similar argument of estoppel and this Court dismissed it. The Court said in part, "Fourteen months remained for such reaudit and deficiency assessment, during which the government did nothing. Having failed to do so, it seeks to transfer the loss from that neglect to appellant taxpayer." This Court in *Van Antwerp* carefully spelled out what would have been necessary to estop the taxpayer, and these elements are not present in the case at bar.

If what the Court intended to suggest was that petitioner is estopped because of inconsistency, petitioner submits that its position is, simply: (1) that it improperly withheld too much tax, (2) that the Commissioner was fully aware of this fact, (3) that

¹¹"The federal excess profits tax law . . . is the most complicated revenue act in the United States history . . . it is safe to say that some of the statutory provisions . . . are so abstruse and confusing as to be hardly intelligible even to the experienced tax specialist . . ." 42 Colum. L.R. 1082 (1942).

the statute of limitations ran and (3) that the Commissioner may not now set that statute aside. If, as a matter of law, the statute of limitations did run, petitioner does not understand why it would either be estopped, or why it would be being inconsistent, to so argue. Regardless of this, however, this Court held in *Hawke v. Comm'r*, 190 F. (2d) 946 (C.A. 9th, 1940), that an inconsistent interpretation of the law by a taxpayer would not preclude him from invoking the statute of limitations. *See also, Comm'r v. Mellon*, 184 F. (2d) 157 (C.A. 3, 1950) (citing the *Hawke* case for this proposition).

Petitioner submits that the holding in the instant case squarely overrules the previous decisions of this Court in *Van Antwerp* and *Hawke*; the result being that the Commissioner is empowered to do indirectly that which the Constitution forbids his doing directly.

In addition, if as the Court held, the information filed two years after the fact corrected the original error, *nunc pro tunc*, or otherwise, then it must necessarily follow that petitioner at all times fully complied with the law, and its position that the Government is not entitled to set aside the statute of limitations at least as to the \$40,000 could not be more straightforwardly consistent.

Petitioner is unaware of any case which has held that the basic and time honored statute of limitations could not be relied upon by a taxpayer where to allow him to do so might result in his benefiting by his own inadvertent noncompliance with the law. Petitioner submits that this can only mean that the statute of

limitations is no longer available to a taxpayer; the natural consequence of which would be to place a heavy premium in the future upon nondisclosure.

Petitioner does not believe that its position should be any different than it would be if instead it had forced the Commissioner to sue it. Petitioner submits that 'noncompliance' with the law in the case at bar was not unilateral, and that the one guilty of the most egregious noncompliance was not taxpayer. Petitioner has never believed, and does not now believe, that the question of equities is properly in issue. However, in order to help obviate the possibility of any misunderstanding in this respect, petitioner would like to assert that at all times it acted in the utmost good faith and that at all times it intended to, and attempted to, fully comply with the law. The Commissioner at all times was in complete possession of the facts and was in a far better position to know the law than was taxpayer. Petitioner fully cooperated with the Commissioner; it made full disclosure at all times; it attempted in good faith to correct its original error; and it believes that the record (although no attempt was made to introduce evidence for this purpose) demonstrates that everything was done which a conscientious citizen could have been expected to do under the circumstances. The petitioner has attempted to preclude the Commissioner from casting aside the statute of limitations because it believes, as was stated in *Van Antwerp*, that the law does not permit the Commissioner to now attempt to shift the loss resulting from his own neglect.

Petitioner very respectfully requests that this Court give favorable consideration to this petition for rehearing.

Dated, Fresno, California,
November 14, 1957.

Respectfully submitted,
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*Attorney for Appellant
and Petitioner.*

KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,
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Of Counsel.

CERTIFICATE

The foregoing petition for rehearing is believed to be well-founded and is presented in good faith and not for delay.

Dated, Fresno, California,
November 14, 1957.

WILLIAM N. SNELL,
*Attorney for Appellant
and Petitioner.*



No. 15,310

IN THE

United States Court of Appeals
For the Ninth Circuit

SUNLAND INDUSTRIES, INC.,
a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

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FILED

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No. 15,310

IN THE

**United States Court of Appeals
For the Ninth Circuit**

SUNLAND INDUSTRIES, INC.,
a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTION.

This is an action for the refund of Federal excess profits taxes for 1943. The District Court had jurisdiction of this action under and pursuant to the provisions of Section 1346(a)(1) of Title 28 of the United States Code as it existed on May 1, 1952, the date upon which the Complaint was filed. The Section cited gives jurisdiction to the District Court of suits for the recovery of Federal taxes where all of the Collectors of Internal Revenue to whom the taxes were paid are no longer in office even though the amount involved may be in excess of \$10,000. This is an action for the recovery of the sum of \$78,130.71 paid

December 14, 1949, to the Collector of Internal Revenue at San Francisco, which said sum is alleged to have been erroneously and illegally assessed and collected. The facts establishing jurisdiction are set forth in Plaintiff's Complaint in the following paragraphs at the pages of the Transcript of Record* indicated in parentheses thereafter: Paragraphs 1 and 2 (page 3) paragraph 3 (page 4) paragraph 8 (page 5) paragraph 10 (pages 5 and 6).

On June 1, 1956, the Court below made an Order Denying Motion for a New Trial (R. 59) which made final the judgment theretofore entered on April 16, 1956 (R. 56), and this Court has jurisdiction under Section 1291 of Title 28 of the United States Code and under Section 1294(1) of Title 28 of the United States Code. These Sections give the United States Courts of Appeals jurisdiction over all final judgments of the District Courts and designate the Circuit to which the appeal shall be taken.

STATEMENT OF THE CASE.

Appellant brought this action to recover \$78,130.71 paid December 14, 1949, on the grounds that such sum was erroneously and illegally assessed and collected in that it was assessed and paid "after the expiration of the period of limitation properly applicable thereto" under Section 3770 (a) (2) of the Internal Revenue Code of 1939, 26 USC 3770(a)(2) (re-

*Hereinafter abbreviated "R."

produced in full in appendix (p. iii)). The only question involved in this proceeding is whether all or any portion of the amount paid December 14, 1949, is governed by the special Statute of Limitations contained in Section 710(a)(5) of the Internal Revenue Code of 1939 (26 USC 710(a)(5)). If such period of limitations does not apply, then the payment made December 14, 1949, was made "after the expiration of the period of limitation properly applicable thereto", and is refundable to Appellant together with interest thereon from the date of payment. (26 USCA Section 3771).

Jurisdiction of the Court and compliance with the conditions precedent to maintaining an action for a refund are not in issue so this Court may confine its attention to the facts and the law directly concerned with the question of whether the \$78,130.71 paid December 14, 1949, was governed in whole or in part by the provisions of Section 710(a)(5) of the Internal Revenue Code of 1939. Section 710(a)(5) of the Internal Revenue Code of 1939 is reproduced in full in the appendix (p. ii).

The portion of the World War II excess profits tax law which is relevant to this proceeding provided a pattern of "relief" for taxpayers who could demonstrate that their earning's history was "abnormal." The method of securing such relief in the usual relief case was by paying the tax in full and then filing an Application for Relief which constituted a claim for refund. Section 710(a)(5) provided an exception to the general rule allowing a deferment of pay-

ment of a part of the tax where the taxpayer met certain additional qualifications. A special Statute of Limitations to cover such amounts was enacted into such section in 1948.

The relevant facts are as follows: The Appellant filed its excess profits tax return for the calendar year 1943 on March 15, 1944, and disclosed an excess profits tax liability of \$193,238.42. Of this amount, the taxpayer paid in installments \$129,469.76 (Stipulation, paragraph II, R. 16, et seq.). The remaining amount of \$63,768.68 was not paid until December 14, 1949 (R. 18), and both parties agree that the general Statute of Limitations (which would be applicable if the provisions of Section 710(a)(5) of the Internal Revenue Code of 1939 do not apply) had then expired.

The printed form of return contained an item designated line "17", which bore the following caption, "Amount deferred by reason of application of Section 710(a)(5) (relating to abnormality under Section 722 (attach schedule))" and on this line the Appellant made the following entry: "In accordance with claim on file, 1942", and the amount "\$63,768.68" (R. 17). Although the Regulations required it, no application for relief was filed with the return, nor were there any schedules or statements filed with the return showing the computation of any excess profits tax relief, nor any computation of the amount deferred (Stipulation R. 18). There were no schedules or statements on the original excess profits tax return for 1943 nor on any material filed with the said excess profits tax return disclosing:

1. The computation in support of the amount entered on line 17 of the excess profits tax return;
2. Grounds for relief or facts in support of grounds for relief under Section 722;
3. A constructive average base period net income or facts in support of a constructive average base period net income (Stipulation R. 18).

Nor was there any disclosure of the percentage relationship between the adjusted excess profits net income (without consideration of Section 722) and the normal tax net income (without consideration of Section 26(e)) on the original excess profits tax return itself nor on any material attached to or filed with the return (Stipulation R. 19).

No claim for relief with respect to 1943 was filed until March 12, 1946 (Stipulation R. 18), although a claim for relief for 1942 had been filed on September 15, 1943 (Stipulation R. 18).

The amount of tax that was unpaid upon the filing of the returns was paid December 14, 1949, and was not assessed until January, 1950 (R. 68 and 69).

The question presented, therefore, is as follows:

Was the \$78,130.71 paid December 14, 1949, "an amount of tax remaining unpaid pursuant to Section 710(a)(5)"?

SPECIFICATION OF ERRORS.

1. The Court erred in failing to hold that the \$78,130.71 paid December 14, 1949, was paid after the expiration of the period of limitations properly applicable thereto. The Court erred in holding that the special Statute of Limitations contained in Section 710(a)(5) of the Internal Revenue Code of 1939 applied to the \$78,130.71 paid December 14, 1949.

2. The Court erred in basing its decision on affirmative defenses of "waiver" and "estoppel" which had neither been pleaded nor proved. The Court erred in overruling Plaintiff's objection to the admission of the evidence contained in paragraph VII of the Stipulation (R. 26 et seq.). In accordance with the stipulation of the parties (R. 85) Plaintiff objected to the admission of all of the evidence contained in paragraph VII of the Stipulation on the grounds that "Said facts are immaterial and irrelevant to this proceeding in that said facts bear solely upon matters constituting an avoidance or an affirmative defense which has not been pleaded as required under F.R.C.P. 8(c)" (R. 41).

3. The Court erred in deciding the case before it was submitted (last paragraph, R. 97; Defendant's Brief filed March 7, 1956, R. 40; Plaintiff's Reply Brief containing objection filed March 27, 1956, R. 40 and 41; Minutes of the Court, March 23, 1956, R. 43; Order Overruling Plaintiff's Objection, R. 44).

SUMMARY OF ARGUMENT.

1. The Appellant failed to pay when due the sum of \$63,768.68¹ excess profit taxes for the year 1943 and also failed to submit with its return any information to justify the deferment of this amount under Section 710(a)(5) of the Internal Revenue Code and the Regulations promulgated thereunder. In such circumstances the Regulations specifically provided that there should be no deferment, that such an amount constituted a part of the "amount of tax shown by the taxpayer on his return" under Section 271 and that the entire tax including such sum should be assessed and collected immediately. These Regulations, being *legislative*, had the force and effect of law, were binding on the taxpayer and Defendant alike, and the failure of the Defendant to follow these Regulations allowed the Statute of Limitations applicable to this sum to expire.

2. The Defendant neither pleaded nor proved any facts in avoidance of Plaintiff's cause of action and the Court erred in basing its decision on the defense of "waiver."

3. The Trial Court committed prejudicial error in deciding the case before it was submitted and prior to considering and acting upon Plaintiff's timely and valid objection to the admission of certain evidence.

4. This being a case where all of the facts have been stipulated the Appellate Court is free to con-

¹This is the actual amount shown on the return. For convenience this brief often refers to the "\$78,130.71" as the amount deferred, but such sum also included interest.

sider them and reach its own conclusions untrammelled by the District Court's findings of fact and conclusions of law.

ARGUMENT.

I.

THE \$70,130.71 WAS NOT AN "AMOUNT REMAINING UNPAID PURSUANT TO" SECTION 710(a)(5) AND WAS A PART OF "THE AMOUNT OF TAX SHOWN BY THE TAXPAYER ON HIS RETURN" UNDER SECTION 271.

A. Section 710(a)(5) required Regulations to make it operative.

The full text of Section 710(a)(5) is as follows:

"Sec. 710(a)(5).—Deferment of Payment in Case of Abnormality. If the adjusted excess profits net income (computed without reference to section 722) for the taxable year of a taxpayer which claims on its return, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, the benefits of section 722, is in excess of 50 per centum of its normal tax net income for such year, computed without the credit provided in section 26(e) (relating to adjusted excess profits net income), the amount of tax payable at the time prescribed for payment may be reduced by an amount equal to 33 per centum of the amount of the reduction in the tax so claimed. For the purposes of section 271, if the tax payable is the tax so reduced, the tax so reduced shall be considered the amount shown on the return. *Notwithstanding any other provision of law or rule of law, to the extent that any amount of tax remaining unpaid pursuant to this paragraph is in excess of the reduction in tax finally determined under section 722, such*

excess may be assessed at any time before the expiration of one year after such final determination.” (Italicized portion added by Public Law 635, passed June 12, 1948).

Congress intended this section only as the skeleton of the power of deferment. That is all it contains. The muscle and sinew was to be added by the Commissioner of Internal Revenue as shown by the phrase “in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.”

Although Congress had previously granted to the Commissioner the right to make all needful rules and regulations concerning the entire subject matter of the revenue laws (IRC 62, 26 USC 62; and IRC 3791(a)(1), 26 USC 3791), Congress did not deem such a general authority sufficient for the purposes of this section and specially granted to the Commissioner the power and the duty to build upon the framework of the section a complete and cohesive system and procedure for the granting and denying of the deferment described therein.

Regulations were promulgated by the Commissioner under this section on March 18, 1943, and were expressly promulgated under the authority of this section. Treasury Decision 5246, 1943 Int. Rev. Cum. Bul. pages 648-672.

B. Regulations promulgated under circumstances such as these are “legislative” not “interpretative” and have the force and effect of law.

Where Regulations are promulgated under and pursuant to specific authority conferred in the section

itself and not solely under the general power granted in Section 3791(a)(1) or Section 62 of the Internal Revenue Code of 1939, such Regulations are legislative in character and have the force and effect of law.

This concept is most clearly expressed in *Davis on Administrative Law* by Kenneth Culp Davis, West Publishing Company, 1951, at page 196 as follows:

“But many provisions of the tax regulations (one commentator counted 56 in the income tax law in 1940) are legislative rules, because they spring from grants of power to create new law. For instance, Section 23(m) provides for a ‘reasonable allowance’ for depletion ‘under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary’.”

The distinction between legislative and interpretative rules is also clearly expressed in the same text at page 194:

“According to the theory, legislative rules are the product of a power to create new law, and interpretative rules are the product of interpretation of previously existing law. Legislative rules may change the law but interpretative rules merely clarify the law they interpret. Valid legislative rules have the same force and effect as valid statutes; the rules are valid if proper procedure is followed and if they are within the statutory and constitutional authority of the agency.”

This doctrine is clearly recognized by *Helvering v. Wilshire Oil Co., Inc.*, 308 US 90, 60 S. Ct. 18 (1939); and *Douglas v. Commissioner*, 322 US 275, 64 S. Ct.

988 (1944) as well as by *Guanacevi Mining Co. v. Commissioner*, 127 F. (2d) 49 (9th Circuit 1942).

Each of the cases cited above had under consideration the provisions of Section 23(m) referred to in the quotation from *Davis on Administrative Law* set forth above which contained as its authorization for the legislative Regulations the phrase: "Under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary." The Regulations here involved were authorized by language differing only slightly: "In accordance with Regulations prescribed by the Commissioner with the approval of the Secretary."

These authorities establish that the Regulations discussed in the next subdivision are just as binding upon the Commissioner as they would be if their provisions were contained in Section 710(a)(5) itself.

A further discussion of the concept is contained in the following law review articles:

Administrative Rules, Interpretive Legislative by K. C. Davis, 57 Yale Law Journal, 919 (1948);

Treasury Regulations and the Wilshire Oil Case by E. C. Alvord, 40 Columbia Law Review 252, 258 (1940);

Treasury Regulations—Interpretive or Legislative? by J. W. Purdy, 23 Cincinnati Law Review, 332 (1954).

C. The Regulations specifically provide that the \$70,130.71 is part of "The amount of tax shown by the taxpayer on his return."

The Regulations promulgated pursuant to the authority discussed above are set forth in full in the Appendix at page iv.

To provide a clear and complete comparison of what is required by the Regulations and what the Appellant did, there will be set forth below in parallel columns, the requirements in Regulations and what the Appellant actually did:

Requirements of Regulations.

1. "A taxpayer which claims to be entitled to a tax deferment under the provisions of Section 710(a)(5) and of this Section *must*, at the time of filing its excess profits tax return on Form 1121, attach thereto an application for relief under Section 722 on Form 991 (revised January, 1943)." (Emphasis supplied.)

2. "The application must set forth *under oath*:

- (a) Each ground under Section 722 upon which the application for relief is based;
- (b) And facts sufficient to apprise the Commissioner of the exact basis thereof and to establish eligibility for relief;

What Appellant Did.

1. No application on Form 991 for relief under Section 722 of the 1939 Revenue Code was attached to or filed with the Plaintiff's excess profits tax return for 1943 (Stipulation paragraph II(E), R. 18, Findings IV R. 48).

2. There were no schedules or statements on the excess profits tax return for 1943 or any material filed with said excess profits tax return setting forth:

- (a) Grounds for relief;
- (b) Facts in support of grounds for relief;

Requirements of Regulations.**What Appellant Did.**

- | | |
|--|---|
| <p>(c) As well as data and information in sufficient detail to establish the amount of constructive average base period net income claimed;</p> <p>(d) The amount of tax reduction claimed by the use of Section 722;</p> <p>(e) The amount of tax deferment claimed on the return."</p> | <p>(c) A constructive average base period net income or facts in support of a constructive average base period net income;</p> <p>(d) The amount of tax reduction claimed by the use of Section 722;</p> <p>(e) Computations in support of the amount entered on line 17, Form 1121
(See Stipulation paragraph II(H) R. 18 and 19).</p> |
|--|---|

Nor were there any schedules or statements on the excess profits tax return for 1943, nor any material filed with said excess profits tax return disclosing the per centum relationship between the excess profits net income and the normal tax net income required to establish eligibility for deferment under the statute itself (Stipulation II(I) R. 19).

Not only did the Regulations *legislatively* promulgated under this Section provide for the form and content required for deferment, but they also anticipated and provided for exactly what is involved in this case. The relevant portion of the Regulations is as follows:

"In any case in which an application for relief on Form 991 (revised January, 1943) is not so attached to the excess profits tax return, the taxpayer shall not be deemed to have claimed on its return the benefits of Section 722. In such case, the amount of tax deferment claimed under Sec-

tion 710(a)(5) and this section shall be added to the amount of tax otherwise shown by the taxpayer to be payable. For the purposes of Section 271 (made applicable to Subchapter (E) of Chapter 2 by Section 729) relating to the definition of deficiency, *the amount of tax shown by the taxpayer to be payable so increased shall be considered the amount of tax shown on the return.*" (Emphasis supplied).

It is clear that the requirement of the above quotation is the requirement that the Form 991 be filled out in accordance with the previous portions of the Regulations; and that the attaching of an obviously incomplete Form 991 would not satisfy the requirements of these Regulations any more than the filing of an obviously incomplete tax return would be sufficient in a closely analogous situation to start the running of the Statute of Limitations.

In *Lucas v. Pilliod Lumber Co.*, 281 US 245, 50 S. Ct. 297 (1930) the Court held that the failure to sign and swear to an otherwise regular return made it so defective that the Statute of Limitations would not commence to run despite the fact that subsequent to the filing thereof and at the request of the Collector a statement intended to supplement and cure the defect was signed, sworn to and filed.

Of similar import is the case of *Commissioner v. Lane-Wells Co.*, 321 US 219, 64 S. Ct. 511 (1944). That case held that the Statute of Limitations did not start to run where the taxpayer failed to file a separate personal holding company return which was re-

quired by Regulations of the Commissioner. In this connection the Court said:

“The purpose is not alone to get tax information in some form but also to get it with such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished.”

The implication by the Trial Court that the only thing Appellant failed to do was to attach a “Form 991” does not in and of itself avoid the problem because even formal defects may be fatal. The Regulations are clear, however, that it is the information to be contained in the form and not just the form itself which the Commissioner requires as a foundation for entitlement to deferment. This is not a case of failing only in submitting the information in (or on) the proper form, but is a case of failing to submit *at all* the information required to support the deferment.

It should be borne in mind that the normal course of processing claims for relief under Section 722 required the payment of the tax in full and the end result of successful prosecution was a *refund* of tax paid. A deferment contemplated by Section 710(a) (5) and the Regulations was allowable only in the *exceptional* case. Before allowing such deferment the Commissioner was charged with the responsibility of determining that the taxpayer *qualified* for the exceptional treatment. This determination was made at the time of the filing of the return. Subsequent consideration of applications for relief could have no bearing

whatsoever upon whether the determination respecting the deferment was rightly or wrongly made at the time of the filing of the return. (Note misunderstanding of this concept contained in conclusion of law, paragraph V, R. 55. Consideration of the application for relief "in the regular fashion" had nothing to do with the determination of whether a deferment should be allowed nor with the amount of the deferment to be allowed.) There is no evidence in this proceeding indicating that the Commissioner did anything in this respect upon the filing of the return. It is not known whether the Commissioner decided at that time that the taxpayer was entitled to deferment, but it is clear that such decision, if made, was erroneous under the terms of the section and the Regulations. It is also clear that at all times subsequent to the filing of the return until June 30, 1949 (over five years) the Commissioner had the complete and unlimited power to assess and collect the \$70,130.71 which the taxpayer failed to pay upon the filing of its return, and there is no evidence in the record indicating that the taxpayer did anything to prevent or forestall the assessment and collection of this amount.

D. Conclusion.

"The amount of tax shown on the return" is governed by the general Statute of Limitations set forth in Section 275(a) of the Internal Revenue Code of 1939. Such amounts may be assessed and collected by the Collector of Internal Revenue at any time without sending any notice of deficiency, and without any other restrictions whatsoever. Obviously the Commis-

sioner was in much better position to enforce his rights here than in cases where the taxpayer's error does not appear on the face of the return. If assessment and collection are barred in a case where the error does not appear on the face of the return, they should certainly be barred in this case. Appellant's action in this respect could mislead no one, least of all the Commissioner, who, under the authority of Section 710(a)(5) had the power and discretion to legislate precisely what should be done in factual situations of this kind. This the Commissioner did, directing his Collectors to assess and collect the entire liability disclosed by the return.

II.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW DISCUSS "WAIVER," "BENEFIT TO TAXPAYER," "TAXPAYER'S OMISSION" AND SIMILAR ITEMS BUT NEITHER FACTUALLY NOR LEGALLY, NEITHER SEPARATELY NOR TOGETHER, DO THESE REFERENCES SUPPORT THE JUDGMENT.

A. The nature of the Statute of Limitations problem.

The basic concept of all Statutes of Limitations presupposes that the person relying upon the Statute will, by virtue of it, be unjustly benefited. It is presupposed that the taxpayer has made an error in his own favor. The justification for this is based upon the proposition that the party against whom the Statute of Limitations raises its bar has been given an adequate period of time within which to discover

the error and take such action as may have been necessary for that party's protection.

It might appear from the language of the findings of fact and conclusions of law that this case involved a unique situation, and one in which the bar of the Statute of Limitations operated unfairly and inequitably against the Defendant and Appellee. To test this concept, consider the usual tax case in which the general Statute of Limitations arises as a bar to the assessment and collection of income taxes. In the usual case the taxpayer, *ex hypothesi* will have understated the amount of tax legally due from him. He will have understated it either by omitting an item of gross income, or by claiming an unjustified deduction, credit or other allowance. In the great majority of the cases the error will not appear upon the face of the return. The return will be regular in all respects so far as appearances are concerned. There will be no opportunity for the Collector to look at the return, look at the Regulations (which bind him) and determine immediately upon the filing of the return that an error has been made. In the great majority of cases an actual field investigation is required to determine the facts as to the taxpayer's true tax liability. How much more difficult it is in the *usual case* for the Commissioner to determine that an error has been made and to take action in protection of his rights! Yet, the Statute of Limitations which applies in such cases is precisely the Statute of Limitations which Appellant contends should apply in this case.

B. Conceptual references in the findings of fact and conclusions of law do not support any recognized legal defense.

Only a brief discussion is required to demonstrate the fallacies contained in the conceptual references in the findings of fact and conclusions of law. Set forth below opposite the language of the findings of fact and conclusions of law these fallacies will be demonstrated.

**Findings of Fact and
Conclusions of Law.**

Fallacy.

1. "The Commissioner took notice of the fact that taxpayer failed *strictly* to follow his Regulations but by his actions he clearly waived the regulatory requirement of filing a Form 991 with the return and allowed the taxpayer a deferment for 1943." (Emphasis supplied.) (Findings XIV, R. 52 and 53.)

2. "Such deferment obviously benefited the taxpayer and having accepted the benefit it cannot be allowed to prevail here on the basis of a clear omission on its part." (Findings XIV, R. 53.)

3. "The reference to the 1942 claim together with the

1. This could be rephrased as follows: "The Commissioner knew that the taxpayer made a mistake, knew that he should assess the tax but decided not to." Note, however, the use of the word "*strictly*." Apparently the Court was reluctant to conclude that the Regulations could be *totally* disregarded. The record, however, shows they *had been* totally disregarded.

2. The omission and the benefit were no more and no different than any taxpayer would have made or received in the usual Statute of Limitations situation, to-wit: there will always be an error or omission and there will always be the benefit of failure to collect.

The omission appeared on the face of the return and the benefit resulted only from the failure to collect.

3. The record is devoid of any evidence showing that the

Findings of Fact and Conclusions of Law.

taxpayer's own course of conduct served to mislead the Commissioner to the extent that the taxpayer should not be allowed to take advantage of any error on the Commissioner's part." (Findings XVII, R. 53 and 54.)

Fallacy.

taxpayer either intentionally or inadvertently mislead the Commissioner in any respect. All *facts* were at all times in possession of the Commissioner. In no way did the taxpayer induce the Commissioner to wrongfully disregard his own Regulations. Paragraph VII(B) of the Stipulation (R. 28 and 29) shows that far from relying on Plaintiff the Commissioner made his own computations. If what happened here is sufficient to avoid the Statute of Limitations how easy it will be for the Commissioner to bring all of the usual Statute of Limitations cases within the doctrine adopted by the Trial Court! The same may be said of the statement that the taxpayer should not be allowed to take advantage of any error on the Commissioner's part. In essence, this finding and the previous one are self-contradictory, saying on the one hand the Commissioner knew what he was doing and on the other that the taxpayer mislead him.

4. "A suit for refund is based on equitable principles and it is in the nature of a suit for money had and received. The Plaintiff cannot be permitted to found its claim upon his own inequity or to take ad-

4. Whenever the Statute of Limitations applies in taxpayer's favor, it will be as a consequence of a taxpayer's error or "wrong." The record is devoid of any error on the taxpayer's part, save the origi-

Findings of Fact and Conclusions of Law.

vantage of its own wrong.”
(Conclusions of Law IV, R. 55.)

Fallacy.

nal error made in the filing of the taxpayer's 1943 return. It is not the taxpayer's wrong that is being taken advantage of, it is the Commissioner's failure to act in accordance with his own Regulations. The reference to a suit for refund, being based on equitable principles is inappropriate. Applied in the way it was applied by the Trial Court, it is obvious the concept would defeat every claim for refund based upon the Statute of Limitations and would fly in the face of the Congressional mandate contained in Section 3770(a)(2) of the Internal Revenue Code. Equitable defenses may be interposed in suits for refunds, but they must be recognized and established equitable defenses (*Ross v. Commissioner*, 169 F. (2d) 483 (1st Circuit, 1948)).

The whole tenor of the findings of fact and conclusions of law suggests the reliance upon an affirmative defense in the nature of an estoppel rather than a fundamental weakness in the contentions of the Appellant. Under F.R.C.P. 8(c) affirmative defenses such as “estoppel” and “waiver” must be affirmatively pleaded. They must be affirmatively pleaded for the two reasons which are dramatically applicable to this case:

1. The Defendant must plead and prove *each* element of a recognized defense;
2. The Plaintiff must be given the opportunity to present evidence or other matter contradicting or avoiding the effect of the purported defense.

There is no suggestion in the answer of the Defendant that it intended to rely upon an affirmative defense. Furthermore, the portion of the Stipulation on which the Defendant relies states expressly that such facts are admissible only to show:

- “1. Whether or not the Commissioner of Internal Revenue knew of the fact that the taxpayer failed to follow his Regulations relating to applications for deferment under Section 710(a)(5) of the 1939 Revenue Code;
2. Whether or not the Commissioner by his actions intended to waive the Regulations to the extent that the taxpayer failed to follow said Regulations.”

There is no suggestion in this Stipulation that the Defendant is relying upon any *conduct of the Plaintiff* as establishing a defense to this action. If paragraph VII is given the limited effect provided for in the Stipulation, the Defendant's failure to establish any recognized defense is even more apparent. It should be noted further that everything described in paragraph VII of the Stipulation happened **OVER FOUR YEARS** after the Plaintiff filed the 1943 return here

in issue, and much of it happened AFTER June 30, 1949, the date on which the general Statute of Limitations expired.

A skeleton summary in timetable form of the facts upon which the Defendant relies is as follows:

May 25, 1948—Defendant mailed to Plaintiff a thirty-day letter covering 1942, 1943, and 1944 (R. 27).

January 14, 1949—Defendant mailed to Plaintiff a Revenue Agent's report for 1945 and 1946 (R. 28).

December 9, 1948—Defendant made a memorandum which was never communicated to Plaintiff (R. 29).

June 30, 1949—The general Statute of Limitations expired.

December 1, 1949—Defendant mailed a thirty-day letter on the Section 722 relief issues (R. 29 and 30).

December 12, 1949—The Plaintiff executed a qualified agreement to the amount of constructive average base period net income (R. 30).

December 20, 1949—Another uncommunicated memorandum was made by Defendant (R. 30 and 31).

April 6, 1950—A "fifteen-day letter" re excess profits tax liability was sent (R. 31).

April 6, 1950—Also included in the fifteen-day letter was a statement that the claim for refund here in issue was recommended for disallowance in full (R. 33).

May 11, 1950—Statutory notice covering 1941, 1942, 1943 and 1945 re excess profits tax was mailed to Defendant (R. 32).

September 27, 1950—A letter between the Internal Revenue Agent in charge at San Francisco and the Deputy Commissioner of Internal Revenue which was never communicated to Plaintiff was written (R. 32 and 33).

The first three items consisting of two Revenue Agent's reports and one uncommunicated memorandum establishing no affirmative conduct of the Plaintiff whatsoever are wholly inadequate to establish any recognized legal defense. If the general Statute of Limitations contained in Section 275(a) of the Internal Revenue Code (26 USC 275(a)) applied as Plaintiff contends, nothing that happened after June 30, 1949, could revive Plaintiff's liability because not even an express agreement to that effect would be valid. Section 276(b) (26 USC 276(b)) which governs agreements extending the Statute of Limitations requires that they be executed "before the expiration of the time prescribed in Section 275 for the assessment of the tax". A good discussion of the proposition that what happens after the Statute of Limitations is run can have no effect, may be found in the case of *Elmer M. Melahn v. Commissioner*, 9 TC 769 (1947) commencing at page 775.

C. References to the 1942 situation.

Finally, the findings respecting what happened relative to the 1942 liability do not remedy the defects

(see Findings IV at R. 48, XIII at R. 52, XVI at R. 53, XVII at R. 54 and Conclusion of Law IV at R. 55).

If the Defendant is relying upon 1942 as establishing an agreed course of conduct respecting the treatment of 1943, the record is insufficient to support this defense for the following reasons:

1. Nothing in the record establishes the date upon which the amount unpaid with respect to 1942 was assessed and collected, for all that the record shows the Commissioner may have discovered his error and assessed and collected this amount prior to the expiration of the general Statute of Limitations, or the Commissioner may have failed to ever collect it.

2. The Defense is in the nature of an estoppel by conduct and the necessary element of "representation", "reasonable reliance", and "detriment" have been neither pleaded nor proved. The case of *Ross v. Commissioner, supra*, stands as authority also for the proposition that what has been done in prior years binds neither the Commissioner nor the taxpayer and particularly is this so where the Commissioner has been given all of the *facts*.

The false suggestion that the reference to the 1942 claim (Finding IV R. 48) supplied all of the defects respecting the 1943 return is also unsupported in the record. Finding XI (R. 51) makes a similar suggestion by referring to "the \$82,229.48 claimed in the application (Form 991) filed for 1942 *upon which was based the deferment of \$63,768.68 of excess profits tax*

liability shown on the original return for 1943."
(Italics supplied.)

The Stipulation clearly provides (paragraph III (C), R. 20) that this \$82,229.48 if applied to 1943 could serve as a basis for the deferment of only \$12,-793.45 because only 33% of the *reduction* in tax claimed may be deferred.

The Defendant should not be allowed to prevail on the contention that he relied upon the existence of the 1942 claim but was not bound by its contents. Clearly cognizant that the mathematics for 1942 as to the *amount of deferment* could not apply to 1943 (Stipulation paragraph III(B), R. 19) Defendant made no attempt to determine the mathematics which would apply if the claim were related to 1943. The case of *Ross v. Commissioner, supra*, also stands as authority and the following quotations from the opinion are appropriate here:

"But in the Crane and Countway cases, knowledge of the facts not disclosed was not imputed to the government. They do not qualify the proposition that a party may not successfully claim reliance on a misrepresentation when he knew the truth, nor probably even when he ought to have known the truth." (p. 495).

"The record before us contains several references to the likelihood that respondent knew, or should have known, the true facts surrounding the accrual of petitioner's salaries and the unrestricted availability of these salaries after April, 1932." (p. 495).

"A mere failure to report income is not a representation that such income has in fact not been

received. Inasmuch as the tax incidence of so many transactions is as doubtful as it is, from the mere failure to report income no more significant inference should be drawn than the taxpayer's own interpretation of the law. And it seems settled that estoppel cannot be predicated upon a mere statement of law or silence resulting from an error of law." (p. 496).

D. Conclusion.

The findings of fact are in many material respects unsupported by any evidence in the record. In other respects they are confusing and contradictory. Together with the conclusions of law they base the judgment upon matters outside the issues framed by the pleadings, unsupported by any evidence, and not properly before the Court.

III.

THE TRIAL COURT ERRED IN DECIDING THE CASE BEFORE IT WAS SUBMITTED TO THE COURT AND PRIOR TO CONSIDERING AND ACTING UPON PLAINTIFF'S TIMELY AND VALID OBJECTION TO THE ADMISSION OF CERTAIN EVIDENCE.

While attorneys for Appellant were working on the Reply Brief to be submitted to the Trial Court pursuant to the Stipulation of Counsel, they received in the mail a letter from the Clerk of the Trial Court dated March 23, 1956, advising that:

"The Court finds assessment and collection of taxes was within the period of limitations, therefore, the Plaintiff take nothing and the Defendant have judgment dismissing the Complaint and for its cost."

When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.” (Italics added)

Nothing could be clearer than that a Defendant wishing to rely upon any theory of “waiver” is required to set such defense forth in his answer. There is not the slightest suggestion in the answer of the Defendant that it intended to rely upon any defense of waiver (R. 11 et seq.).

Absent the contents of paragraph VII the record contains not even a suggestion of a defense. The objection was good, it was made in timely fashion and the Appellant was prejudiced by the failure of the Trial Court to sustain the objection.

IV.

THE APPELLATE COURT IS NOT BOUND IN ANY WAY BY THE FINDINGS OF THE TRIAL COURT.

Appellant wishes to briefly remind the Court that this case, being submitted by stipulation, is one where the Trial Court’s findings have none of the usual intendments in favor of them. They are entitled to slight, if any, weight, and this Court is free to consider the stipulation and reach its own conclusions untrammelled by the District Court’s findings and conclusions of law. *Equitable Life Assurance Society of the U. S. v. Irelan*, 123 F. (2d) 462 (CCA 9 1942);

Wigginton v. Order of United Commercial Travelers of America, 126 F. (2d) 659 (CCA 7 1942).

CONCLUSION.

Appellant respectfully submits that the Trial Court clearly committed error and that the granting of this appeal reversing the judgment of the Trial Court and ordering the refund as prayed for together with interest as provided by law is the only meet and proper decision in the premises.

Dated, Fresno, California,
February 12, 1957.

Respectfully submitted,

WILLIAM N. SNELL,

Attorney for Appellant.

KIMBLE, THOMAS, SNELL,

JAMISON & RUSSELL,

CROSSLAND, CROSSLAND & RICHARDSON,

Of Counsel.

(Appendix Follows.)

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Appendix.

Appendix

STATUTES INVOLVED.

Internal Revenue Code:

Section 23 (26 USC Sec. 23):

Deductions from gross income.

“In computing net income there shall be allowed as deductions: . . .”

(m) Depletion.

“In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. . . .”

Section 271(a) (26 USC Sec. 271(a)):

Definition of deficiency—(a) In general.

“As used in this chapter in respect of a tax imposed by this chapter, ‘deficiency’ means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b) (2), made.”

Section 275(a) (26 USC Sec. 275(a)):

Period of limitation upon assessment and collection—(a) General Rule.

Except as provided in section 276—

“The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.”

Section 276(b) (26 USC Sec. 276(b)):

Same—Exceptions . . . (b) Waiver.

“Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.”

Section 710(a)(5) (26 USC Sec. 710(a)(5)):

Deferment of payment in case of abnormality.

“If the adjusted excess profits net income (computed without reference to section 722) for the taxable year of a taxpayer which claims on its return, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, the benefits of section 722, is in excess of 50 per centum of its normal tax net income for such year, computed without the credit provided in section 26(e) (relating to adjusted excess profits net income), the amount of tax pay-

able at the time prescribed for payment may be reduced by an amount equal to 33 per centum of the amount of the reduction in the tax so claimed. For the purposes of section 271, if the tax payable is the tax so reduced, the tax so reduced shall be considered the amount shown on the return. Notwithstanding any other provision of law or rule of law, to the extent that any amount of tax remaining unpaid pursuant to this paragraph is in excess of the reduction in tax finally determined under section 722, such excess may be assessed at any time before the expiration of one year after such final determination.”

Section 3770(a)(2) (26 USC Sec. 3770(a)(2)):

Authority to make abatelements, credits, and refunds—To taxpayers . . . Assessments and collections after limitation period.

“Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.”

Section 3771 (26 USC Sec. 3771):

Interest on overpayments—(a) Rate.

“Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum. . . .

“In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner,

A taxpayer which claims to be entitled to a tax deferment under the provisions of section 710(a)(5) and of this section must, at the time of filing its excess profits tax return on Form 1121, attach thereto an application for relief under section 722 on Form 991 (revised January, 1943). The application must set forth under oath each ground under section 722 upon which the application for relief is based and facts sufficient to apprise the Commissioner of the exact basis thereof and to establish eligibility for relief, as well as data and information in sufficient detail to establish the amount of constructive average base period net income claimed, the amount of tax reduction claimed by the use of section 722, and the amount of tax deferment claimed on the return. In any case in which an application for relief on Form 991 (revised January, 1943) is not so attached to the excess profits tax return, the taxpayer shall not be deemed to have claimed on its return the benefits of section 722. In such case the amount of tax deferment claimed under section 710(a)(5) and this section shall be added to the amount of tax otherwise shown by the taxpayer to be payable. For the purposes of section 271 (made applicable to Subchapter E of Chapter 2 by section 729) relating to the definition of deficiency, the amount of tax shown by the taxpayer to be payable so increased shall be considered the amount of tax shown on the return.

For the purposes of section 271, in case a taxpayer has claimed a tax reduction under section 710(a)(5) and has attached Form 991 (revised January, 1943)

to its excess profits tax return as provided in this section, the tax so reduced shall be the tax shown on the return.

If a constructive average base period net income has been finally determined and has been used in computation of the excess profits tax for a prior excess profits tax taxable year under section 722 and under regulations prescribed under such section, such constructive average base period net income may be applicable in the computation of the excess profits tax for the current excess profits tax taxable year. In such case, the excess profits tax for such current year shall be computed with the use of such constructive average base period net income, and the provisions of section 710(a)(5) shall be inapplicable with respect to such year.

The application of section 710(a)(5) may be illustrated by the following example:

Assume that corporation B, which makes its return on the calendar year basis, has for 1942 a net income of \$1,010,000, which includes \$300,000 of dividends on the common stock of domestic manufacturing corporations, \$10,000 of interest on certain United States Government obligations which is exempt from the normal tax, and \$20,000 of long-term capital losses which are offset against an equal amount of short-term capital gains. Its adjusted net income is \$1,000,000, and it has an excess profits credit of \$95,000, and no unused excess profits credit adjustment. It has filed, with its excess profits tax return for 1942,

an application for relief under section 722 in which it claims a constructive average base period net income of \$600,000. Its excess profits tax return for 1942, computed without regard to section 722, shows an amount of tax deferred under section 710(a)(5) of \$99,584.10, and an excess profits tax due of \$494,685.90, computed as follows:

Excess Profits Tax

1. Normal tax net income (computed without allowance of credit under section 26(e) for income subject to excess profits tax and without allowance of dividends received credit) (item 22)	\$1,000,000.00
2. Plus long-term capital loss adjustment.....	200,000.00
3. Item 1 plus item 2	\$1,200,000.00
4. Less dividend received credit adjustment (100 percent of item 25)	300,000.00
5. Excess profits net income	\$ 900,000.00
6. Less specific exemption	\$ 5,000
7. Excess profit credit	95,000
8. Total of item 6 and item 7	100,000.00
9. Adjusted excess profits net income (item 5 minus item 8)	\$ 800,000.00
10. Excess profits tax (90 percent of item 9).....	720,000.00
11. Net income (computed without regard to credit provided in section 26(e) relating to income subject to excess profits tax) (item 21)	\$1,010,000.00
12. Dividends received	\$300,000
13. Less dividends received credit (85 percent of item 12, but not in excess of 85 percent of item 11)	255,000.00

14.	Corporation surtax net income (computed without regard to the credit provided in section 26(e)) (item 11 minus item 13).....	\$ 755,000.00
15.	80 percent of item 14	\$ 604,000.00
16.	Income tax under chapter 1 (other than section 102) for the taxable year (item 36)	9,730.00
17.	Excess of item 15 over item 16.....	\$ 594,270.00
18.	Excess profits tax (item 10 or item 17, whichever is lesser)	\$ 594,270.00
19.	Less tax deferred under section 710(a)(5) (item 56)	99,584.10
20.	Excess profits tax payable (item 18 minus item 19)	\$ 494,685.90

Normal Tax

21.	Net income	\$1,010,000.00
22.	Adjusted net income (item 21 minus \$10,000 interest on certain U. S. obligations).....	\$1,000,000.00
23.	Less income subject to excess profits tax (credit under section 26(e)) (item 9).....	800,000.00
24.	Item 22 minus item 23	\$ 200,000.00
25.	Dividends received	\$300,000
26.	Less dividends received credit (85 percent of item 25 but not in excess of 85 percent of item 24)	170,000.00
27.	Normal tax net income	\$ 30,000.00
28.	Normal tax (\$4,250 plus 31 percent of \$5,000)	\$ 5,800.00

Surtax

29.	Net income (item 21)	\$1,010,000.00
30.	Less income subject to excess profits tax (credit under section 26(e)) (item 9).....	800,000.00

31. Item 29 minus item 30	\$ 210,000.00
32. Dividends received	\$300,000
33. Less dividends received credit (85 percent of item 32 but not in excess of 85 percent of item 31)	178,500.00
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34. Corporation surtax net income	\$ 31,500.00
	<hr/>
35. Surtax (\$2,500 plus 22 percent of \$6,500)....	\$ 3,930.00
	<hr/>
36. Total normal tax and surtax (item 28 plus item 35)	\$ 9,730.00

Percentage which adjusted excess profits net income bears to normal tax net income computed without credit under section 26(e) for income subject to excess profits tax.

37. Adjusted excess profits net income computed without regard to section 722 (item 9).....	\$ 800,000.00
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38. Adjusted net income (item 22)	\$1,000,000.00
39. Dividends received	\$300,000
40. Dividends received credit (85 percent of item 39 but not in excess of 85 percent of item 38)	255,000.00
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41. Normal tax net income (computed without re- gard to the credit for income subject to excess profits tax under section 26(e)).....	\$ 745,000.00
42. Percentage which item 37 bears to item 41.... percent	107
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Tax deferred under Section 710(a)(5)

Excess profits tax under Section 722

43. Excess profits net income (item 5).....	\$ 900,000.00
44. Less specific exemption	\$ 5,000
45. Excess profits credit based on con- structive excess profits net income under section 722 (95 percent of \$600,000)	570,000
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46. Item 44 plus item 45	575,000.00
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47.	Adjusted excess profits net income computed under section 722 (item 43 minus item 46)....	\$ 325,000.00
48.	Excess profits tax under section 722 (90 percent of item 47)	\$ 292,500.00
49.	Corporation surtax net income (computed without regard to the credit provided in section 26(e)) (item 14)	\$ 755,000.00
50.	80 percent of item 49	\$ 604,000.00
51.	Income tax under Chapter 1 (other than section 102) for the taxable year, computed with the excess profits tax determined under section 722 (item 72)	169,600.00
52.	Excess of item 50 over item 51	\$ 434,400.00
53.	Excess profits tax computed without the benefit of section 722 (item 17)	\$ 594,270.00
54.	Excess profits tax computed under section 722 (item 48 or item 52, whichever is lesser).....	292,500.00
55.	Amount of tax reduction claimed under section 722 (item 53 minus item 54)	\$ 301,770.00
56.	Amount of tax deferred under section 710(a) (5) (33 percent of item 55)	\$ 99,584.10

Normal Tax

57.	Net income (item 21)	\$1,010,000.00
58.	Adjusted net income (item 22)	\$1,000,000.00
59.	Less income subject under section 722 to excess profits tax (credit under section 26(e)) (item 47)	325,000.00
60.	Item 58 minus item 59.....	\$ 675,000.00
61.	Dividends received	\$300,000
62.	Less dividends received credit (85 percent of item 61 but not in excess of 85 percent of item 60)	255,000.00

63. Normal tax net income	\$ 420,000.00
64. Normal tax (24 percent of item 63).....	\$ 100,800.00

Surtax

65. Net income (item 21)	\$1,010,000.00
66. Less income subject under section 722 to excess profits tax (credit under section 26(e)) (item 47)	325,000.00
67. Item 65 minus item 66	\$ 685,000.00
68. Dividends received	\$300,000
69. Less dividends received credit (85 percent of item 68 but not in excess of 85 percent of item 67)	255,000.00
70. Corporation surtax net income (item 67 minus item 69)	\$ 430,000.00
71. Surtax (16 percent of item 70)	68,800.00
72. Total normal tax and surtax (item 64 plus item 71)	169,600.00

(The following paragraph was added by amendment, T.D. 5679, 1949-1CB132, December 16, 1948 as the result of the enactment of the limitation provision in 1948. It did not appear in the text in effect the date the Plaintiff's 1943 Excess Profits Tax return was filed.)

If the taxpayer defers under section 710(a) (5) payment of an amount in excess of the reduction in tax finally determined under section 722, such excess may be assessed at any time before the expiration of one year after such final determination. Such assessment may be made regardless of whether the assessment of a deficiency for such taxable year is otherwise barred by the running of any period of limitations, by the decision of any court, including The Tax Court,

or by any other provision (such as section 272(f)) or rule of law. The reduction in tax under section 722 is finally determined, in cases in which the Commissioner's action is subject to review by The Tax Court under section 732, upon the expiration of the period for review with The Tax Court or, if such petition is filed, upon the Commissioner's sending notice by registered mail to the taxpayer of his final action on the application for relief under section 722. If the Commissioner should, at the request of the taxpayer, agree because of unusual circumstances to reconsider his action on an application, the immediately preceding sentence shall be applied with respect to the Commissioner's second determination.

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No. 15310

**United States
Court of Appeals**
for the Ninth Circuit

SUNLAND INDUSTRIES, INC., a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Northern Division.**

FILED

JAN - 7 1957



No. 15310

**United States
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SUNLAND INDUSTRIES, INC., a Corporation,
Appellant,

vs.

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Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Northern Division.**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, North-
ern Division, Southern District of California

Civil Action, No. 1162-ND

SUNLAND INDUSTRIES, INC., a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT TO RECOVER INTERNAL
REVENUE TAXES

The above-named Plaintiff for its complaint alleges as follows:

1. Plaintiff, Sunland Industries, Inc., is, and at all times material hereto has been, a corporation duly organized and existing under the laws of the State of California, maintaining its principal office at Fresno, Fresno County, California.

2. Upon information and belief, on or about the 1st day of January, 1943, Harold A. Berliner became the duly appointed and qualified Collector of Internal Revenue of the United States for the First District of California and continued to act as such until on or about March 31, 1945, at which time he ceased to hold the office of Collector of Internal Revenue of the United States for the First District of California.

3. Upon information and belief, on or about the 14th day of May, 1945, James G. Smyth became the duly appointed and [2*] qualified Collector of Internal Revenue of the United States for the First District of California, and continued to act as such until on or about the 27th day of September, 1951, at which time he was removed from office.

4. On or about March 15, 1944, Plaintiff filed, in the office of the Collector of Internal Revenue of the United States for the First District of California its excess profits tax return for the year 1943, showing the total amount of its excess profits tax for said year as \$193,238.42.

5. Thereafter as the result of audit by the Bureau of Internal Revenue the total excess profits tax liability of Plaintiff for said year was determined to be \$194,881.09.

6. Plaintiff, on or about the following dates, made the following payments totaling \$129,469.76 on its excess profits tax liability for 1943 to the Collector of Internal Revenue for the First District of California: March 15, 1944—\$32,367.44; June 12, 1944—\$32,367.44; September 14, 1944—\$32,367.44; December 12, 1944—\$32,367.44.

7. Prior to December 14, 1949, the only payment of excess profits taxes for 1943 made by Plaintiff in addition to those set forth in paragraph 6 was the sum of \$1,318.28 which was paid to the Collector

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

of Internal Revenue for the First District of California on or about September 10, 1948.

8. On December 14, 1949, Plaintiff paid to the Collector of Internal Revenue for the First District of California the sum of \$78,130.71, constituting payment of \$58,089.75 excess profits tax liability for 1943 and \$20,040.96 interest accrued under Section 294 of the Internal Revenue Code. [26 U.S.C. Section 294.]

9. On December 23, 1949, Plaintiff duly filed with the Collector of Internal Revenue for the First District of [3] California a refund claim for excess profits taxes paid in respect of the calendar year 1943 in the amount of \$78,130.71 with interest on the grounds that such tax and interest was paid after the expiration of the period of limitation properly applicable thereto. [Internal Revenue Code Section 3770 (a) (2), 26 U.S.C. Section 3770 (a) (2).] A full, true and correct copy of said claim for refund is attached hereto as "Exhibit A" and is incorporated by reference herein the same as though set forth in full. This claim was rejected by the Commissioner of Internal Revenue on or after May 11, 1950, and Plaintiff was notified by registered mail on or after said date. The facts set forth in paragraphs 4, 8, 12, 13, 14, 15, 16, 17, 18, 19 and 20 were set forth in said refund claim as the ground thereof.

10. Inasmuch as all Collectors to whom all of Plaintiff's payments of 1943 excess profits taxes and interest were made are out of office, this suit

is brought against the defendant, United States of America, pursuant to Title 28, United States Code, Section 1346.

11. This action arises under the laws of the United States providing for internal revenue, as hereinafter more fully appears.

12. While the total amount of excess profits tax liability of Plaintiff for 1943 shown on its return as described in paragraph 4 above was \$193,238.42, Plaintiff paid only the total sum of \$129,469.76 prior to audit by the Bureau of Internal Revenue because on line 17 of said return opposite the caption "Amount deferred by reason of the application of Section 710 (a) (5) (relating to abnormality under Section 722) (attach schedule)" Plaintiff entered this statement, "In accordance with claim on file 1942," and the sum of \$63,768.68, [4] which said sum was deducted from the total amount of excess profits tax set forth on said return as stated in paragraph 4 above. Attached hereto as "Exhibit B," for convenient reference only, is a full, true and correct copy of Section 710 (a) (5) of the Internal Revenue Code. [26 U.S.C. 710 (a) (5).] Attached hereto as "Exhibit C," for convenient reference only, is a full, true and correct copy of Regulations 112, Section 35.710-5, promulgated by the Commissioner of Internal Revenue, approved by the Secretary and in effect at the time Plaintiff filed its 1943 excess profits tax return.

13. Plaintiff did not file with its return an application for relief under Section 722 of the Internal

Revenue Code for the year 1943, nor was any explanatory schedule attached to said return, nor did taxpayer file such application for relief at any time during 1944 and no application was filed until on or about March 9, 1946.

14. Neither the excess profits tax return for 1943 nor any schedules or other documents attached thereto or filed therewith set forth under oath each ground under Section 722 upon which the claim for relief was based nor facts sufficient to apprise the Commissioner of the exact basis thereof nor to establish eligibility for relief nor to establish the amount of constructive average base period net income claimed or the amount of tax reduction claimed by the use of Section 722.

15. Plaintiff was deemed not to have claimed the benefits of Section 722 of the Internal Revenue Code on its return for the year 1943 and was not entitled to deferment of any portion of its excess profits tax for said year under Section 710 (a) (5) of the Internal Revenue Code. [26 U.S.C. 710 (a) (5).]

16. Subsequent to the filing of said excess profits tax return and prior to March 15, 1947, Plaintiff entered into an agreement, the exact date of which is unknown to [5] Plaintiff, with the Commissioner of Internal Revenue extending the period within which additional excess profits taxes for said year could be assessed to and including June 30, 1949, which said agreement further provided to the effect that the period within which claims for refund

could be filed by Plaintiff for excess profits taxes paid with respect to said year would expire on December 31, 1949. No other agreement further extending said period was ever entered into by Plaintiff.

17. The Collector of Internal Revenue for the First District of California made the following assessments of Plaintiff's excess profits taxes for the year 1943: \$129,469.74 assessed on or about March 15, 1944, under original account Number 400824; \$1,100.59 assessed on or about August 20, 1948, under Additional Account Number 529048. At no time prior to July 1, 1949, was any portion of the amount of excess profits tax for the year 1943 in excess of the sum of \$130,570.33 assessed nor were any proceedings for the collection thereof instituted or prosecuted.

18. Together with the payments described in paragraph 8, Plaintiff filed an amended excess profits tax return for the year 1943 to which was attached the following statement:

"By filing these amended returns and paying the tax shown thereon, and interest computed thereon, taxpayer does not intend and shall not be deemed to waive any claims it may have which would result in a reduction of such tax and/or interest, or any portion thereof, nor any defenses to the assessment or collection of said taxes and/or interest, or any portion thereof, and taxpayer expressly reserves the right to file and prosecute claims for refund for all or any portion [6] of said tax or

interest, based on any and all available grounds, including the Statute of Limitations.’’

19. The Application for Relief under Section 722 (on Treasury Department Form 991) which had been filed for the year 1942 and which was referred to in the 1943 excess profits tax return of Plaintiff claimed a constructive average base period net income of \$82,229.48. The excess profits credit based on the constructive average base period net income claimed by Plaintiff in said application is \$78,118.00 and Plaintiff's excess profits tax liability for 1943 computed by using said credit instead of the actual excess profits credit is not less than \$156,113.06. Based upon Plaintiff's Application for Relief under Section 722 which had been filed for the year 1942, Plaintiff was entitled to deferment of 1943 excess profits tax of not in excess of \$12,793.45.

20. The Application for Relief under Section 722 (on Treasury Department Form 991) which was filed for the year 1943 on or about March 9, 1946, claimed a constructive average base period net income of \$90,201.74. The excess profits credit based on the constructive average base period net income claimed by Plaintiff in said application is \$85,691.65 and Plaintiff's excess profits tax liability for 1943 computed by using said credit instead of the actual excess profits credit is not less than \$149,386.77. Based upon Plaintiff's Application for Relief under Section 722 which was filed for the year 1943,

Plaintiff was entitled to deferment of 1943 excess profits tax of not in excess of \$15,013.13.

21. The entire amount of Plaintiff's excess profits tax for the year 1943 remaining unpaid as of July 1, 1949, to wit \$58,089.75, did not constitute an amount of tax [7] remaining unpaid pursuant to Section 710(a)(5) of the Internal Revenue Code, [26 U. S. C. Section 710(a)(5)] but, on the contrary, constituted a portion of the amount of tax shown by the taxpayer to be payable on Plaintiff's 1943 excess profits tax return. Such amount together with interest in the sum of \$20,040.96 was assessed and paid after the expiration of the period of limitation properly applicable thereto [26 U. S. C. 275(a) and 26 U. S. C. 276(b)] and constituted an overpayment to the refund to which Plaintiff is entitled, together with interest thereon from December 14, 1949, the date of payment. Said payment further constitutes a payment of internal revenue taxes which have been erroneously and illegally assessed and collected. No part of said amount or amounts has heretofore been paid or credited to Plaintiff.

Wherefore, Plaintiff demands judgment against defendant in the sum of \$78,130.71, with interest thereon allowable under the statute, together with the costs and disbursements of this action.

KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
A member of the firm.

CROSSLAND & CROSSLAND,

By /s/ WILLIAM C. CROSSLAND,

A member of the firm.

Attorneys for Plaintiff.

Duly authorized.

[Endorsed]: Filed May 1, 1952. [8]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant United States of America and by way of answer to the complaint on file herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraph I of the complaint.

II.

Admits the allegations contained in Paragraph II of the complaint.

III.

Admits the allegations contained in Paragraph III of the complaint.

IV.

Denies the allegations contained in Paragraph IV of the complaint, except it is admitted that plaintiff filed its excess profits tax [32] return for the year 1943 with the Collector of Internal Revenue for the First Collection District of California; said return showed a total excess profits tax of \$193,238.42 and

a deferment under Section 710(a)-5 "in accordance with claim on file 1942" of \$63,768.68. The total tax due on said return was \$129,469.74.

V.

Denies the allegations contained in Paragraph V of the Complaint, except it is admitted that as a result of audit the total excess profits liability for said year was determined to be \$194,881.09, of which \$64,310.76 was deferred by reason of application of Section 710(a)-5 of the Internal Revenue Code, making the total assessable excess profits tax for said year \$130,570.33.

VI.

Denies the allegations contained in Paragraph VI of the Complaint, except it is admitted that plaintiff made the following payments, totaling \$129,469.74: March 15, 1944, \$32,367.44; June 15, 1944, \$32,367.44; September 15, 1944, \$32,367.44; and December 14, 1944, \$32,367.42.

VII.

Denies the allegations contained in Paragraph VII of the Complaint, except it is admitted that in addition to the payments mentioned in Paragraph VI of this Answer, the sum of \$1261.96, including interest of \$271.43, was paid to the Collector of Internal Revenue for the First District of California for 1943 excess profits tax on September 13, 1948.

VIII.

Admits the allegations contained in Paragraph VIII.

IX.

Denies the allegations contained in Paragraph IX of the Complaint, except that it is admitted that on December 23, 1949, plaintiff filed a claim for refund of 1943 excess profits tax in the sum of \$78,130.71 of which Exhibit A to the Complaint appears to be a copy. All the allegations contained in said exhibit are denied, except to the extent [33] otherwise expressly admitted in this answer.

X.

Admits the allegations contained in Paragraph X of the Complaint.

XI.

Admits the allegations contained in Paragraph XI of the Complaint.

XII.

Admits the allegations of fact of Paragraph XII of the Complaint, except it is alleged that plaintiff paid the total sum of \$129,469.74; denies all conclusions of law in said Paragraph XII, and does not admit or deny the exhibits for the reason that they are conclusions of law.

XIII.

Denies the allegations contained in Paragraph XIII of the Complaint, except it is alleged that plaintiff filed a claim on Form 991 for relief under Section 722 of the Internal Revenue Code for the year 1943 on March 12, 1946.

XIV.

Denies the allegations contained in Paragraph XIV of the Complaint, except it is admitted that Form 991 was not filed with the excess profits tax return for the year 1943.

XV.

Denies the allegations contained in Paragraph XV of the Complaint.

XVI.

Denies the allegations contained in Paragraph XVI of the Complaint, except it is admitted that on December 2, 1946, plaintiff executed Form 872 extending the time within which income or excess profits tax for the year 1943 could be assessed to June 30, 1948, and on April 16, 1948, executed Form 872 extending the time for assessment of income and excess profits tax for the year 1943 to June 30, [34] 1949.

XVII.

Denies the allegations contained in Paragraph XVII of the Complaint, except it is admitted that the Commissioner of Internal Revenue assessed excess profits tax against plaintiff on the following dates and in the amounts shown: May 23, 1944, \$129,469.74; and August 20, 1948, \$1,100.59.

XVIII.

Denies the allegations contained in Paragraph XVIII of the Complaint, except it is admitted that on December 14, 1949, plaintiff filed an amended excess profits tax return for the year 1943.

XIX.

Denies the allegations contained in Paragraph XIX of the Complaint.

XX.

Denies the allegations contained in Paragraph XX of the Complaint.

XXI.

Denies the allegations contained in Paragraph XXI of the Complaint.

Wherefore, having fully answered, defendant prays it be dismissed together with its costs expended.

WALTER S. BINNS,

United States Attorney ;

E. H. MITCHELL and

EDWARD R. McHALE,

Assistant U. S. Attorneys ;

EUGENE HARPOLE and

FRANK W. MAHONEY,

Special Attorneys,

Bureau of Internal Revenue,

By /s/ FRANK W. MAHONEY,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 29, 1952. [35]

[Title of District Court and Cause.]

STIPULATION OF FACTS

Except where expressly set forth as an exception to the general terms of this stipulation, It Is Hereby Stipulated, that for purposes of this proceeding the statements set forth in this stipulation shall be accepted as facts without prejudice to the right of either party to introduce other and further evidence not inconsistent therewith and without prejudice to their right to object to the materiality or relevancy of any of the facts agreed to. The various Paragraph are labeled with headings purely for the convenience of court and counsel in relating the parts of the stipulation to each other and no evidentiary weight or effect is to be attributed thereto. [46]

Paragraph I.

Suit Involves World War II Excess Profits Tax

The tax liability referred to in this stipulation is the liability arising under Subchapter "E" of Chapter 2 of the 1939 Revenue Code, as said 1939 Code was from time to time amended, which shall hereinafter be called the "excess profits tax."

Paragraph II.

Circumstances of the Tax Liability in Issue Part 1, the E. P. T. Return

(A) On March 15, 1944, the Plaintiff filed his original excess profits tax return for the taxable

year 1943 with the Collector of Internal Revenue for the First District of California. The return was filed on a Treasury Form 1121. A true and correct copy of this return has been introduced into evidence as Joint Exhibit "1-A."

(B) The total excess profits tax liability shown upon such return was \$193,238.42, the amount entered on Line 16, Page 1, of the Form 1121. The tax payable shown upon such return was \$129,469.74, the amount entered on Line 24, Page 1. The amount \$129,469.74 was the total excess profits tax liability reduced by the amount \$63,768.68 which was shown opposite line 17 together with the following statement: "In accordance claim on file 1942." Line 17 of Form 1121 bore the caption "amount deferred by reason of application of Section 710(a)(5) (relating to abnormality under Section 722) (attach Schedule)."

(C) Plaintiff's entire liability for the \$129,469.74 tax payable shown upon the return was assessed and collected before July 1, 1949. In addition, certain miscellaneous amounts were assessed and collected as a result of adjustments suggested [47] by Revenue Agents with respect to the \$129,469.74 amount. No assessment, collection or notice of deficiency was made at any time prior to July 1, 1949, with respect to Plaintiff's liability for the \$63,768.68 subtracted from the tax payable as described in subparagraph II, B. A summary of all assessments and collections with regard to Plaintiff's 1943 ex-

cess profits tax liability has been introduced into evidence as Joint Exhibit "2-B."

(D) The payment on December 14, 1949, described in Paragraph VIII was made upon Plaintiff's liability for the \$63,768.68, subtracted from tax payable as described in subparagraph II, B.

(E) No application on Form 991 for relief under Sec. 722 of the 1939 Revenue Code was attached to or filed with Plaintiff's excess profits tax return.

(F) An application for relief under Sec. 722 for the taxable year 1942 had been filed on Form 991 on September 15, 1943, and that application is the one referred to by the notation "in accordance claim on file 1942." The factual circumstances of this application are set forth in Paragraph III.

(G) An application for relief under Sec. 722 for the taxable year 1943 was first filed on Form 991 on March 12, 1946. The factual circumstances of this application are set forth in Paragraph IV.

(H) There were no schedules or statements on the original E. P. T. return for 1943, or on any material filed with said E. P. T. return disclosing:

(1) Computation in support of the amount entered on line 17 of Form 1121;

(2) Grounds for relief, or facts in support of grounds for relief, under Sec. 722;

(3) A constructive average base period net income [48] or facts in support of a constructive average base period net income;

(4) The amount of tax reduction claimed by use of Sec. 722.

(I) There was no disclosure of the percentage relationship between the adjusted excess profits net income (without consideration of Sec. 722) and the normal tax net income (without consideration of Sec. 26(e)) on the original E. P. T. return itself or on any material attached to or filed with the return.

Paragraph III.

Circumstances of the Tax Liability in Issue Part 2, Form 991 for Taxable Year 1942

(A) The application for relief under Sec. 722 of the 1939 Revenue Code for the taxable year 1942 was filed on or about September 15, 1943, using Form 991 and was on file at the time Plaintiff filed its excess profits tax return for 1943 and was the Application referred to by the notation "in accordance claim on file 1942" made upon the return. A true and correct copy of the relevant portions of this application for relief has been introduced into evidence as Joint Exhibit "3-C."

(B) The amounts and calculations appearing on page 1 of said application as part of the computation of an amount deferred under Sec. 710(a)(5) of the 1939 Revenue Code and the amounts and calculations appearing on page 1 as part of the computation of the reduction of tax under Sec. 722 related to the taxable year 1942. The amounts and calculations appearing on page 2 as part of the com-

putation of a constructive average base period net income could relate to other taxable years.

(C) The application for relief under Sec. 722 for the taxable year 1942 claimed a constructive average base period net income of \$82,229.48. The hypothetical computation of a deferment under Sec. 710(a)(5) using this amount and a total [49] excess profits tax liability (before benefit of Sec. 722) of \$193,238.42 would result in a reduction under Sec. 722 of \$38,768.03 and a deferment of \$12,793.45.

Paragraph IV.

Circumstances of the Tax Liability in Issue
Part 3, Form 991, Filed in 1946

(A) On or about March 12, 1946, the Plaintiff filed an application for relief under Sec. 722 of the 1939 Revenue Code with respect to the taxable year 1943 using Form 991 (revised January, 1943). A true and correct copy of the relevant portions of this application for relief has been introduced into evidence as Joint Exhibit "4-D."

(B) As part of the computation and amounts shown, said application for relief set forth the following material on page 1 thereof:

Application for Relief Under Section 722
of the Internal Revenue Code

(Intermediate Items Omitted.)

8. Reduction in tax under Section 722	
(line 6 minus line 7).....	\$ 45,494.32

(Intermediate Items Omitted.)

12. If line 11 exceeds 50 per cent, amount of tax deferred under Section 710 (a) (5) (33 per cent of line 8) (enter as item 17, page 1, Form 1121)\$ 63,768.68

- 13 Total net relief claimed with respect to tax shown on return (line 8 minue line 12).....\$(16,274.36)

14. Total excess profits tax for the taxable year paid at or prior to time this application is filed\$ 129,469.74

- 15 Amount of refund or credit for which this application is a claim (see Instruction III).....\$ None

(C) It is a common and accepted practice in filling out Internal Revenue Service forms to note a negative amount by showing the amount bracketed by parenthesis, wherefore the amount \$16,274.36, shown as item 13 in the excerpt set forth in subparagraph (B) above, represents a negative amount.

(D) Plaintiff claimed a constructive average base period net income of \$90,201.74 in this application for relief, and a reduction in taxes under Sec. 722 of \$45,494.32. The hypothetical computation of a deferment under Sec. 710(a)(5) of the 1939 Revenue Code using the amount of \$45,494.32 would result in a deferment of \$15,013.13.

Paragraph V.

Circumstances of the Tax Liability in Issue
Part 3, Error in Computation

Subparagraph (A) Excepted from General Terms of Stipulation. The following subparagraph (a) may be introduced as evidence on the following basis and none other: to wit, for the convenience of the Plaintiff in presenting its case with the express reservation that the defendant is not bound thereby.

(A) The following table sets forth all the arithmetic steps necessary to compute the amount of tax that can be deferred under Sec. 710(a)(5) of the 1939 Revenue Code: [51]

STEP	DESCRIPTION OF ARITHMETIC STEP	Illustrative Example (see footnote)
STARTING POINT	THE CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME IS THE STARTING POINT.	\$100,000
STEP 1	COMPUTE THE EXCESS PROFITS CREDIT BASED ON THE CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.	
	i Constructive average base period net income	\$100,000
	ii Multiply..by .95 (statutory factor)	x .95
	iii Excess profits credit based on the constructive average base period net income	\$ 95,000
STEP 2	COMPUTE THE ADJUSTED EXCESS PROFITS NET INCOME UNDER SEC.722.	
	i Excess profits net income	\$300,000
	ii Subtract..\$5,000 statutory exemption	-5,000
	iii Subtract..excess profits credit based on constructive average base period net income	-95,000
	iv Adjusted excess profits net income under Sec. 722	\$200,000
STEP 3	COMPUTE EXCESS PROFITS TAX UNDER SEC. 722.	
	i Adjusted excess profits net income under Sec. 722	\$200,000
	ii Multiply..by .90 (90% statutory tax rate)	x .90
	iii Excess profits tax computed under Sec. 722	\$180,000
STEP 4	COMPUTE THE AMOUNT OF REDUCTION CLAIMED UNDER SEC. 722.	
	i Excess profits tax computed without the benefit of Sec. 722 (From E.P.T. Return)	\$210,000
	ii Subtract...e.p.t. computed under Sec. 722	-180,000
	iii Amount of tax reduction claimed under Sec. 722	\$ 30,000
STEP 5	COMPUTE THE AMOUNT OF DEFERMENT THAT MAY BE CLAIMED UNDER SEC. 710(a)(5).	
	i Amount of tax reduction claimed under Sec. 722	\$ 30,000
	ii Multiply..by statutory factor .33	x .33
	iii Amount of deferment that may be claimed under Sec. 710(a)(5)	\$ 9,900

Footnote - The amounts used in this example were chosen for convenience in illustrating the calculations. They are not intended to affect or represent the amounts involved in this action.



(B) The proper method of computing an amount to be entered as Item 17, Page 1 of Form 1121, would be to compute such amount as 33% of the amount of reduction of taxes claimed under Section 722 of the 1939 Revenue Code. Such reduction of taxes would be shown as Item 8, Page 1 of Form 991.

(C) The amount \$63,768.68 entered as Item 17, Page 1 of Form 1121 filed as Plaintiff's E. P. T. return, was computed as 33% of the total excess profits tax entered as Item 16, Page 1 of Form 1121. Plaintiff erred in its method of computation.

Paragraph VI.

Events Relating to a General (3 Year) Statute of Limitations

(A) The Plaintiff duly filed his original excess profits tax return for the taxable year 1943 with the Collector of Internal Revenue for the First District of California on or before March 15, 1944. A true and correct copy of this return has been introduced into evidence as Joint Exhibit "1-A."

(B) The Plaintiff and the Commissioner of Internal Revenue entered into an agreement under Sec. 276(b) of the 1939 Revenue Code on Form 872 consenting in writing that the Plaintiff's excess profits liability for the taxable year 1943 may be assessed at any time on or before June 30, 1948. This agreement was signed by the Plaintiff on December 2, 1946, and signed by the Commissioner on

December 6, 1946. A true and correct copy of the agreement has been introduced into evidence as Joint Exhibit "5-E."

(C) The Plaintiff and the Commissioner of Internal Revenue entered into a subsequent agreement under Sec. 276(b) on Form 872 consenting in writing that the Plaintiff's excess profits tax liability for the taxable year 1943 may be assessed at any time on or before June 30, 1949. This agreement was [53] signed by the Plaintiff on April 16, 1948, and by the Commissioner on April 27, 1948. A true and correct copy of the agreement has been introduced into evidence as Joint Exhibit "6-F."

(D) No other agreement or agreements on Form 872 were executed regarding the Plaintiff's excess profits tax liability for the taxable year 1943.

Paragraph VII.

Events Relating to a Special Statute of Limitations
Found in Sec. 710(A)(5) as Amended by Sec.
3 of PL 635, 6-12-48

Subparagraphs (A) Through (I) Excepted from General Terms of Stipulation. The following subparagraphs (A) through (I) may be introduced as evidence for the sole purpose and upon only the following issues and none other, to wit: (1) whether or not the Commissioner of Internal Revenue knew of the fact that the taxpayer failed to follow his regulations relating to applications for deferment under Sec. 710(a)(5) of the 1939 Revenue Code;

(2) whether or not the Commissioner by his actions intended to waive the regulations to the extent that the taxpayer failed to follow said regulations. The parties stipulate and agree that the court shall not consider any of the matters or alleged facts contained in subparagraphs (A) through (I) as evidence or proof of the accuracy or truth of such matters or facts, except as they bear on said issues.

(A) The Defendant mailed to the Plaintiff on May 25, 1948, a Revenue Agent's report together with a letter on Form 1200 commonly known as a "30-day letter" in connection with the audit examination of Plaintiff's income tax returns for the years 1942, 1943, and 1944. Said Revenue Agent had custody of the Plaintiff's complete original 1942, 1943, and 1944 returns at the time of said audit examination. As part of the computation of excess profits tax for the year 1942, said Revenue Agent's report set forth the following material on page 4 thereof: [54]

Schedule No. 5

Computation of Excess Profits Tax

Excess profits net income, from Schedule No. 4.....\$137,336.93

(Intermediate Items Omitted.)

Excess profits tax: Above balance, or 90% of adjusted
excess profits net income whichever is the lesser
amount 94,492.49

Amount deferred by reason of application

Sec. 710 (a) (5)..... 31,182.52

Total excess profits tax assessable.....\$ 63,309.97

As part of the computation of excess profits tax for the year 1943, said Revenue Agent's Report set forth the following material on page 11 thereof:

Schedule No. 13

Computation of Excess Profits Tax

Excess profits net income, from Schedule No. 11.....\$256,873.37

(Intermediate Items Omitted.)

Excess profits tax:

Above balance, or 90% of adjusted excess profits

net income, whichever is the lesser amount.....\$194,881.09

Amount deferred by reason of application of Sec.

710(a) (5) 64,310.76

Excess profits tax\$130,570.33

Total excess profits tax assessable.....\$130,570.33

(B) The defendants mailed to the Plaintiff on January 14, 1949, a Revenue Agent's report (together with a letter on Form 892), in connection with the field audit examination of Plaintiff's income tax returns for the years 1945 and 1946 dated December 9, 1948, which as a part of the computations of adjustments to the surplus account as of 1/1/45 set forth the following material on page 14 thereof: [55]

Exhibit C

Adjustments to Surplus

Surplus return (Form 1120), 1/1/45 \$ 218,507.94

(Intermediate Items Omitted.)

Deduct—Additional taxes—

Franchise tax, 1943.....\$ 55.34

Franchise tax, 1944..... 79.64

Income taxes, 1943 & 1944..... 1,280.73

D.V.E.P. Taxes '42-43 & '44..... 1,346.27

E.P.T. 1942-43 & '44..... 13,061.83 \$(15,823.81)

Tax deferred under Sec. 710(a) (5)		
per books	\$94,619.68	
As adjusted by prior R.A.B.....	95,493.28	(873.60)
Surplus, as adjusted, 1/1/45		\$ 267,980.61

(C) The Defendant's administrative file in connection with the field audit and examination of Plaintiff's 1945 and 1946 returns contained a memo dated December 9, 1948, signed by Barry O. Stuart, the Revenue Agent who made the field audit examination of said returns. The following item starts at page T-2 of said memo:

"The provisions of Section 102 were discussed with Mr. Luttermoser, full-time accountant for firm, and he was advised that the dividend rate should be upped considerably if earnings continued high. It was stated the government bonds in amount of \$112,000.00 were obtained to hold as a reserve in the event the company was unsuccessful in prosecuting its claims under Section 722 and was required to pay the excess profits tax deferred under Section 710(a)(5) of approximately \$96,000.00."

This memo was never at any time communicated to the Plaintiff. [56]

(D) By letter dated December 1, 1949, commonly known as a special 30-day letter, which enclosed a copy of a Section 722 report dated November 4, 1949, the Internal Revenue Agent in Charge, San Francisco, California, informed the Plaintiff that a constructive average base period

No credit was given in this statement to the \$55,989.09 excess profits tax voluntarily paid by taxpayer on December 14, 1949. It was pointed out in this statement that the average income credit of \$27,345.28 claimed in the original return for 1943 was not changed to the constructive average base period income of \$32,958.62, for the reason that it would have resulted in a greater deficiency due to the 80 per cent limitation provided [58] in Code Section 710(a)(1)(B) in computing the tax.

(G) On May 11, 1950, a statutory notice in the form of a 90-day letter was sent to Plaintiff disclosing deficiencies and overassessments previously determined for years 1941, 1942, 1943 and 1945, resulting from the determination of the Excess Profits Tax Council, including excess profits tax deficiency of \$64,310.76 for 1943. It was stated therein that the claim for relief under Section 722 for the year 1943 was denied in full, and it was also stated that the deficiency resulted because of the deferment of a portion of the tax liability under Section 710(a)(5). It was further stated therein that the notices of deficiencies and allowances of relief under Sec. 722 given thereunder were given in accordance with the provisions of Sec. 272 and 732 of the Internal Revenue Code.

(H) By letter of September 27, 1950, the Internal Revenue Agent in Charge, San Francisco, was informed by the Deputy Commissioner of Internal Revenue that assessment of deficiency of

\$55,989.09 on the amended excess profits tax return for 1943 filed December 14, 1949, reduced the excess profits tax deficiency for that year of \$64,310.76 (per 90-day letter) to \$8,321.67. A Certificate of Assessment and Payments dated July 8, 1952, states that \$8,321.67 was assessed with interest in November, 1950, all of which was offset by various credits. This letter was never at any time communicated to the Plaintiff.

(I) In the statement attached to the Internal Revenue Agent in Charge's letter of April 6, 1950, to the Plaintiff, commonly known as a 15-day letter, the Plaintiff's refund claim for the year ending December 31, 1943, filed on December 23, 1949, was considered. In connection therewith, the Internal Revenue Agent in Charge, at page 2 of the statement, said the following: [59]

"A deficiency in excess profits tax in the amount of \$64,310.76 for the year ended December 31, 1943, is disclosed by this statement. It is held that this deficiency is due to the deferment allowed pending the settlement of the Section 722 issue and that in accordance with the provisions of Section 710(a)(5) of the Internal Revenue Code, such deficiency may be assessed any time before the expiration of one year after the final determination of tax under Section 722. It is therefore recommended that your claim for refund be disallowed in full."

Paragraph VIII.
The Alleged Overpayment

(A) In order to stop any accumulation of interest with respect to the tax liability in issue, Plaintiff made a payment of \$78,130.71 to the Collector of Internal Revenue for the first district of California on December 14, 1949, with respect to the 1943 E. P. T. This was in partial payment of the tax and interest upon Plaintiff's tax liability for the \$63,768.68 subtracted from taxes payable as described in subparagraph II, B. \$58,089.75 of said payment consisted of excess profits taxes and \$20,040.96 consisted of interest thereon.

(B) Said \$78,130.71 payment was mailed to the Collector of Internal Revenue together with an unsigned amended excess profits tax return for the taxable year 1943 containing the following statement:

"By filing these amended returns and paying the tax shown thereon, and interest computed thereon, taxpayer does not intend and shall not be deemed to waive any claim it may have which would result [60] in a reduction of such tax and/or interest or any portion thereof, nor any defenses to the assessment or collection of said taxes and/or interest, or any portion thereof, and taxpayer expressly reserves the right to file and prosecute claims for refund of all or any portion of said payments, based on any and all available grounds, including the Statute of Limitations."

(C) No amount of the alleged overpayment described in subparagraph VIII, A, has been refunded or otherwise returned to the Plaintiff.

Paragraph IX.

Administrative Claim for Refund

(A) A claim for refund for the \$78,130.71, "alleged overpayment" described in paragraph VIII was duly filed with the Collector of Internal Revenue for the First District of California on December 23, 1949, nine days after the payment of the tax. A true and correct copy of this claim has been introduced into evidence as Joint Exhibit "7-G."

(B) This claim was filed on a Form 843, and all statements contained therein were made under oath. It related to refunds with respect to a single taxable year, 1943.

(C) The alleged ground or grounds upon which the refund was claimed were set forth in detail. For a full disclosure of these alleged grounds, see the true and correct copy of this claim for refund introduced into evidence as Joint Exhibit "7-G."

(D) Sufficient facts to apprise the Commissioner of the exact basis of the claim were set forth. For a full disclosure of these facts, see the true and correct copy of this claim introduced into evidence as Joint Exhibit "7-G." [61]

(E) This claim was rejected by the Commissioner of Internal Revenue on or after May 11,

1950, and the Plaintiff was notified of such rejection by registered mail on or after May 11, 1950.

Paragraph X.

Facts Re: Courts Jurisdiction and Venue

(A) The Plaintiff, Sunland Industries, Inc., is and at all times material hereto has been a corporation duly organized and existing under the laws of the State of California, with its principal office and place of business at Fresno, Fresno County, California.

(B) The alleged overpayment described in Paragraph VIII was paid to the Collector of Internal Revenue for the First District of California while that office was held by James G. Smyth. James G. Smyth began to hold such office on or about the 14th day of May, 1945, and continued to hold such office until on or about the 27th day of September, 1951, at which time he was removed from office.

(C) Harold A. Berliner became the duly appointed and qualified Collector of Internal Revenue for the First District of California on or about the first day of January, 1943. He continued to hold this office until on or about March 31, 1945, at which time he ceased to hold this office.

Dated: This 5th day of January, 1956.

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Assistant United States Attorney, Chief, Tax
Division,

By /s/ EDWARD R. McHALE,
Attorneys for Defendant.

KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Plaintiff.

[Endorsed]: Filed June 5, 1956. [62]

[Title of District Court and Cause.]

MINUTES OF THE COURT
JAN. 5, 1956

Present: Hon. Ernest A. Tolin, District Judge.

Counsel for Plaintiff: Michael F. Oglo.

Counsel for Defendant: Edward R. Mc-
Hale, Ass't U. S. Att'y.

Proceedings:

For trial. Court convenes herein, this being the time regularly set for trial of this action. All parties are present in court and announce they are ready to proceed.

Attorney for plaintiff makes opening statement.

Attorney for defendant makes opening statement.

Plf's & Deft's Joint Exhibits:

1-A (U. S. Corp. excess profit tax return for year 1943),

2-B (Summary of assessments and collections with respect to Plaintiff's 1943 excess profits tax liability),

3-C (Application for relief under section 722 of the Internal Revenue Code),

4-D (Application for relief under section 722 of the Internal Revenue Code),

5-E (Consent fixing period of limitation upon assessment of Income and Profits Tax),

6-F (Consent fixing period of limitation upon assessment of Income and Profits Tax),

7-G (Claim), and stipulation of facts

are admitted in evidence.

Filed stipulation of facts by respective counsel. Plaintiffs rest.

No evidence is offered by defendant.

Defendant rests.

It Is Ordered that cause be submitted on briefs, plaintiff to file opening brief in thirty days, defendant to file answer thirty days thereafter, and plaintiff to file closing brief twenty days after defendant files its answer; the cause then to stand Submitted upon filing of final brief.

JOHN A. CHILDRESS,
Clerk. [63]

March 23, 1956.

Kimble, Thomas, Snell, Jamison & Russell
1001 Helm Building
Fresno, California

Crossland & Crossland
Brix Building
Fresno, California

Mr. Edward McHale
Assistant U. S. Attorney
600 Federal Building
Los Angeles, California

Re: Sunland Industries, Inc., vs.
United States of America,
Case No. 1162-ND Civil

Gentlemen:

The above-entitled matter having been taken under submission after trial and upon filing of briefs, Judge Tolin directed the entry of the following order this date:

“The Court finds assessments and collection of taxes was within the period of limitations, therefore the plaintiff take nothing and defendant have judgment dismissing the complaint and for its costs.”

Counsel for the defendant will please prepare the formal order for dismissal.

Very truly yours,

JOHN A. CHILDRESS,
Clerk,

By WM. A. WHITE,
Deputy Clerk.

cc: Elbie Eiland

Dep. Clk, Fresno [163]

[Title of District Court and Cause.]

DEFENDANT'S BRIEF

* * *

[Endorsed]: Filed March 7, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S REPLY BRIEF

* * *

Argument

- I. Arguments Raised in Defendant's Brief Are Based upon Waiver and Estoppel Theories Which Have Not Been Affirmatively Pleaded. Under F.R.C.P. 8(c) These Arguments and the Related Proposed Findings of Facts Cannot Be Considered by the Court and Any Evidence Related to These Theories Must Be Excluded.

The right to object to the materiality and relevancy of any evidence has been expressly reserved. It was agreed between the parties and the court that attention would be called to these matters in the briefs. (See Reporter's Transcription of proceedings January 5, 1956, page 5, et seq.) Material arguments in the defendant's brief are clearly based upon waiver and estoppel, which should have been affirmatively pleaded under F.R.C.P. 8(c). These matters were in no way developed in the pleading stage of this proceeding. Accordingly, the Plaintiff hereby objects to the introduction into evidence of those facts found in Paragraph VII of the stipulation upon the grounds that said facts are immaterial and irrelevant to this proceeding in that said facts bear solely upon matters constituting an avoidance or affirmative defense which has not been pleaded as required under F.R.C.P. 8(c). [166]

* * *

KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Plaintiff.

Certificate of Service attached.

[Endorsed]: Filed March 27, 1956. [177]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The plaintiff moves the Court to set aside the following order made March 23, 1956:

“The Court finds assessments and collection of taxes was within the period of limitations, therefore the plaintiff take nothing and defendant have judgment dismissing the complaint and for its costs.”

and to grant plaintiff a new trial on the grounds that:

1. The Court erred in deciding the case before the case had been submitted. At page 17, line 20, of the Reporter's Transcript the Court stated that the case would be deemed submitted at the time the closing brief is in. At line 22, page 10, through line 1, page 11, of the Reporter's Transcript, it was [181] agreed that plaintiff would submit the opening brief within 30 days, defendant would submit defendant's answering brief within the next 30 days and plaintiff would submit the reply brief within the next 20 days.

Defendant's answering brief was filed March 7, 1956, and plaintiff's reply brief was therefore not due before March 27, 1956.

2. The plaintiff was prejudicially affected by the failure of the Court to await filing of the reply brief and considering of it because, pursuant to the stipulation of counsel (lines 2 through 13, page 4,

Reporter's Transcript), objections were made in the reply brief and the effect of the premature decision is to avoid the necessity for ruling upon these objections. The plaintiff is prejudicially affected because the objections of plaintiff in this regard go to the question of whether the defense presented by defendant is even properly before the Court. A copy of Plaintiff's Reply Brief is attached hereto in support of this ground. The original of said brief is being filed herewith.

3. The judgment is contrary to law in that it is unsupported by the evidence properly before the Court.

KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Plaintiff.

[Endorsed]: Filed March 27, 1956. [182]

[Title of District Court and Cause.]

MINUTES OF THE COURT
MARCH 23, 1956

Present: Hon. Ernest A. Tolin, District Judge.
Counsel for Plaintiff: No Appearance.
Counsel for Defendant: No Appearance.

Proceedings:

This matter having been taken under submission after trial and filing of briefs,

The Court Finds that assessments and collection of taxes was within the period of limitations, and that, therefore, plaintiff take nothing, and defendant have judgment dismissing the complaint, and for its costs.

Clerk notify counsel.

JOHN A. CHILDRESS,
Clerk. [183]

[Title of District Court and Cause.]

ORDER OVERRULING PLAINTIFF'S
OBJECTION TO INTRODUCTION OF
EVIDENCE

The Court, having duly considered the objections raised in plaintiff's Reply Brief to defendant's evidence, to wit, Paragraph VII of the Stipulation, and it appearing to the Court that said facts are material and relevant to the issues raised by both the pleadings and Paragraph VII of said Stipulation, it hereby rules as follows:

Plaintiff's objections are overruled and the facts stipulated in Paragraph VII are admitted into evidence for the purposes agreed upon in said paragraph.

Dated: This 16th day of April, 1956.

/s/ ERNEST A. TOLIN,
United States District Judge.

Presented by:

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Asst. U. S. Attorney,
Chief, Tax Division.

/s/ EDWARD R. McHALE,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

Lodged April 4, 1956.

[Endorsed]: Filed April 18, 1956. [184A]

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION OF FACTS

It Is Hereby Stipulated, that for purposes of this proceeding, it shall be accepted as a fact that no assessment of any portion of the amount of Plaintiff's excess profits tax for the year 1943 in excess of the sum of \$130,570.33 was made prior to July 1, 1949; and it shall be accepted as a fact that no proceeding in court for the collection of any portion of the amount of Plaintiff's excess profits tax for the year 1943 in excess of the sum of \$130,570.33 was begun or prosecuted prior to July 1, 1949.

Dated: This 1st day of May, 1956.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

By /s/ EDWARD R. McHALE,
Attorneys for Defendant.

KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Plaintiff.

[Endorsed]: Filed May 2, 1956. [206]

United States District Court for the Southern
District of California, Northern Division

No. 1162-ND Civil

SUNLAND INDUSTRIES, INC., a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

The above case came on for trial in the Northern
Division of this Court at Fresno, California, on

January 5, 1956, the Hon. Ernest A. Tolin, United States District Judge, sitting without a jury, presiding, the plaintiff represented by its counsel, Kimble, Thomas, Snell, Jamison & Russell, by William N. Snell and Michael F. Oglo, Esqs., the defendant represented by its counsel, Laughlin E. Waters, United States Attorney for said District, and Edward R. McHale, Assistant United States Attorney for said District, Chief, Tax Division, and evidence and stipulations of fact having been received, and the Court having duly considered the same, the pleadings, and all the briefs and arguments of the parties, and having directed entry of judgment for defendant, now finds as follows: [211]

Findings of Fact

I.

Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal office located in Fresno, California.

II.

The plaintiff filed its returns and kept its books on an accrual and calendar year basis. Its excess profits tax return for 1943, filed March 15, 1944, shows the following pertinent data:

- | | |
|---|--------------|
| (1) Excess profits credit based on income | \$ 27,345.28 |
| (2) Excess profits tax liability..... | 193,238.42 |
| (3) Amount of item (2) deferred under § 710(a) (5)..... | 63,768.68 |

- (4) Net excess profits tax due (Joint
Ex. 1-A)..... 129,469.74

The return shows the total excess profits tax liability to be \$193,238.42. The total tax due on said return was \$193,238.42.

III.

The net excess profits due per return was duly paid in installments. The amount shown in item (3) in the preceding paragraph, was deferred under § 710(a) (5) by reason of a claim for relief under § 722, relating to an excess profits credit based on a constructive average base period net income. On the line of the return on which the amount deferred was entered, opposite the caption "Amount deferred by reason of application of Section 710(a) (5) (relating to abnormality under Section 722) (attach schedule)," the following statement was made: "In accordance with claim on file 1942."

IV.

An application for § 722 relief (Form 991) was not filed with the return. [212] A claim for relief under § 722 had been filed on Form 991 for 1942, however, on September 15, 1943, and that application claimed a constructive average base period net income of \$82,229.48 and is the one referred to in the 1943 return. A Form 991 expressly for 1943 was not filed until March 12, 1946.

V.

On January 23, 1950, the Excess Profits Tax Council in effect disallowed the plaintiff's § 722

claim. Plaintiff was so informed by letter dated April 6, 1950, and was rendered a statement of over-assessments and deficiencies for various years including 1943.

VI.

A deficiency of \$55,989.09 in excess profits tax for 1943, and interest of \$19,316.23, was assessed on the January, 1950, list. This amount had been paid on December 14, 1949, in order to stop the running of interest, since the taxpayer had been advised that the Internal Revenue Agent in Charge, San Francisco, was recommending against allowance of its § 722 claim.

VII.

On December 23, 1949, plaintiff duly filed with the Collector of Internal Revenue for the First District of California, San Francisco, California, a claim for refund of the \$78,130.71 payment made on December 14, 1949. The claim for refund was filed on Form 843 and in all respects complied with the regulations applicable thereto and set forth in full the grounds on which the claimant relied. This claim was rejected by the Commissioner of Internal Revenue and notice of rejection was given by registered mail May 11, 1950. No portion of said \$78,130.71 has been refunded or credited to plaintiff. This action was brought within the time provided in § 3772(2) of the Internal Revenue Code of [213] 1939.

VIII.

The plaintiff had filed consents extending to June 30, 1949, the time for assessment for 1943. The pay-

ment made by taxpayer on December 14, 1949, was accompanied by an unsigned amended return to which was attached a statement to the effect that that plaintiff did not waive its right to claim such payment was untimely.

IX.

The statutory notice of deficiencies or overassessments sent by the Commissioner to the taxpayer on April 6, 1950, is the final determination referred to in § 710(a) (5) of the Internal Revenue Code of 1939.

X.

By letter dated December 1, 1949, which enclosed a copy of a § 722 report (RAR dated November 4, 1949), the Internal Revenue Agent in Charge, San Francisco, California, informed the plaintiff that a constructive average base period net income of \$32,958.62 was being allowed for the taxable years ended December 31, 1941, 1942, 1943 and 1945. This represented a partial allowance of taxpayer's application for relief filed under provisions of Code § 722. It was stated in the same letter that, if taxpayer was in accord with this determination, it should promptly execute and forward the enclosed form of agreement in order that prompt review of the recommendation by the Excess Profits Tax Council could be made. Otherwise, it was given 30 days to file a protest to the Internal Revenue Agent in Charge. The letter further stated, "This letter is not a final notice of determination under § 732 of the Internal Revenue Code." The agreement form

was signed by the plaintiff on December 12, 1949, and was mailed to the Internal Revenue Agent in Charge on December 14, 1949, together with a letter of transmittal stating that the plaintiff did not waive thereby any claims with respect to the assessment or collection of such taxes, and was received by the Internal Revenue Agent in Charge. [214]

XI.

A recommended constructive average base period income of \$32,958.62 was far less than the \$82,229.48 claimed in the application (Form 991) filed for 1942, upon which was based the deferment of \$63,768.68 of excess profits tax liability shown on the original return for 1943, or that claimed of \$90,201.74 in the application for relief (Form 991) for 1943 filed on March 12, 1946. Excess profits credit based on average income used in the original 1943 return was \$27,345.28, and the § 722 report did not change this to the recommended constructive average base period income of \$32,958.62. This meant that any claim for relief under § 722 was denied in full for 1943.

XII.

The Commissioner of Internal Revenue was aware of the omission of the plaintiff in filing his 1943 excess profits tax return without the Form 991 attached. On the revenue agent's report, dated April 28, 1948, a copy of which was mailed to the taxpayer May 25, 1948, reference is made to the deferment of \$64,310.76 for 1943 and \$31,182.52 for 1942 (slight

variance from amounts deferred on return of \$63,-768.68 and \$30,851.00, respectively, due to corrected computations). The revenue agent's report dated December 9, 1948, which was mailed to the plaintiff on January 14, 1949, noted the deferments under § 710(a) (5). The administrative file of the Internal Revenue Service concerning the taxpayer contained a memorandum dated December 9, 1948, signed by the revenue agent who made the field audit of the return, which memorandum stated that the taxpayer stated to the agent that government bonds in the amount of \$112,000.00 were obtained to hold as a reserve in the event the company was unsuccessful in prosecuting its claims under § 722 and was required to pay the excess profits tax deferred under § 710(a) (5) of approximately \$96,000.00 (\$64,310.76 plus \$31,182.52). Both reports were [215] prepared some time prior to the expiration of time for assessing ordinary deficiencies, June 30, 1949.

XIII.

The Form 991 relied upon in the 1943 return was not filed until four months following the filing of the 1942 excess profits tax return on which a portion of the tax was also deferred under § 710(a) (5). In that instance, also, the Commissioner waived the requirements of his regulations by allowing taxpayer to defer a portion of its taxes.

XIV.

The Commissioner of Internal Revenue took notice of the fact that the taxpayer failed strictly

to follow his regulations, but by his actions he clearly waived the regulatory requirement of filing a Form 991 with the return and allowed the taxpayer the deferment for 1943. Such deferment obviously benefited the taxpayer and having accepted the benefit, it cannot be allowed to prevail here on the basis of a clear omission on its part.

XV.

Having waived the requirement of filing the Form 991 with the return, under the requirements of the Code § 710(a) (5), the Commissioner could assess the deferred tax any time before the expiration of one year after the final determination under § 722. The final determination was at the earliest on January 23, 1950, when the Excess Profits Tax Council approved the finding of the Internal Revenue Agent in Charge relating to the determination of the constructive average base period net income. The assessment and collection of the tax and interest herein questioned was before that date, hence timely, and the defendant is entitled to judgment that the plaintiff take nothing and for its costs.

XVI.

The reference to a Form 991 on file with the 1942 return in the 1943 return served to incorporate such form in the 1943 return. [216]

XVII.

The reference to the 1942 claim together with the taxpayer's own course of conduct served to mislead

the Commissioner to the extent that the taxpayer should not be allowed to take advantage of any error on the Commissioner's part.

XVIII.

Plaintiff paid sums aggregating \$130,570.15 on its excess profits tax liability for 1943 prior to June 30, 1949. The remainder of plaintiff's excess profits tax liability for 1943 in the sum of \$58,089.75, together with interest thereon in the sum of \$20,040.96, was assessed and paid after June 30, 1949.

XIX.

Any conclusion of law herein which is deemed to be a fact is hereby found as a fact and incorporated herein as a finding of fact.

Conclusions of Law

From the foregoing facts, the Court concludes as follows:

I.

The Court has jurisdiction of this controversy and of the parties hereto.

II.

Plaintiff invoked the relief provisions contained in the World War II profits tax and by so doing put into effect the special statute of limitations under § 710(a) (5).

III.

The Commissioner of Internal Revenue properly waived certain requirements of the Treasury Regulations compelling the taxpayer to file with its re-

turn an application for relief on Form 991 and, therefore, the assessment of the taxes and interest in question was timely.

IV.

The plaintiff by referring to the 1942 claim on file and the [217] plaintiff's own course of conduct served to mislead the Commissioner to the extent that the plaintiff cannot be allowed to take advantage of any error on the Commissioner's part. A suit for refund is based on equitable principles and is in the nature of a suit for money had and received. The plaintiff cannot be permitted to found its claim upon his own inequity or to take advantage of its own wrong.

V.

The entire amount of the tax and interest assessed and collected was assessed and collected timely. Until the application for relief was considered in the regular fashion, the determination could not be made of an amount properly deferred.

VI.

Any finding of fact herein which is deemed to be a conclusion of law is hereby concluded as a matter of law and incorporated herein as a conclusion of law.

VII.

The assessment and collection of taxes and interest here in issue was within the period of limitations and the defendant timely and properly assessed and collected said taxes and interest from plaintiff.

VIII.

The defendant is entitled to judgment that the plaintiff take nothing, that the complaint be dismissed with prejudice and the defendant have its costs.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, it is ordered, adjudged and decreed:

That the plaintiff take nothing by its complaint; that the complaint may be and is dismissed with prejudice and that the defendant have judgment for and shall recover from plaintiff the [218] amount of its costs to be taxed by the Clerk of this Court in the sum of \$20.00.

Dated: This 16th day of April, 1956.

/s/ ERNEST A. TOLIN,

United States District Judge.

Affidavit of service by mail attached.

Lodged April 4, 1956.

[Endorsed]: Filed April 18, 1956.

Docketed and entered April 19, 1956. [219]

[Title of District Court and Cause.]

ORDER GRANTING IN PART AND DENYING
IN PART PLAINTIFF'S MOTION TO
AMEND AND SUPPLEMENT FINDINGS
OF FACT, CONCLUSIONS OF LAW

This cause came on to be heard upon motion of the plaintiff to amend and supplement findings of fact and conclusions of law, before the Court, the Hon. Ernest A. Tolin, United States District Judge, presiding, in the Northern Division at Fresno, California, on May 11, 1956, and the Court having considered the pleadings, evidence, motions, memoranda and arguments of counsel, hereby orders as follows:

(1) The deletion requested in part 4 of the Motion with respect to Finding No. IV is granted so that the following language is stricken from the first sentence of said Finding at lines 32, page 2, of the Findings, to wit:

“nor within six months from the date prescribed for filing such a return, as required by § 722(b) of the Code.”

A period is added after the word “return” so that the first sentence [221] of said Finding now reads:

“An application for § 722 relief (Form 991) was not filed with the return.”

The balance of said Finding No. IV is undisturbed.

(2) The amendment requested in part 6 of the Motion is granted to the extent of adding the word

“unsigned” to the second sentence of Finding No. VIII so that said sentence now reads as follows:

“The payment made by taxpayer on December 14, 1949, was accompanied by an unsigned amended return to which was attached a statement to the effect that the plaintiff did not waive its right to claim such payment was untimely.”

(3) Plaintiff's request number 7 to add additional language to Finding No. X is granted so that the last sentence of Finding No. X is now amended to read as follows:

“The agreement form was signed by the plaintiff on December 12, 1949, was mailed to the Internal Revenue Agent in Charge on December 14, 1949, together with a letter of transmittal stating that the plaintiff did not waive thereby any claims with respect to the assessment or collection of such taxes, and was received by the Internal Revenue Agent in Charge.”

All other requests to amend and supplement the Findings of Fact and Conclusions of Law may be, and are, hereby denied.

The Clerk is ordered to make the aforesaid changes by interlineation of the Findings of Fact heretofore executed by the Court and filed on April 18, 1956, and to present the Findings to the Court for initialing the changes.

Dated: This 1st day of June, 1956.

/s/ ERNEST A. TOLIN,
United States District Judge.

Approved as to form pursuant to Local Rule 7(a)
this 29th day of May, 1956.

KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Plaintiff.

[Endorsed]: Filed June 1, 1956. [223]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This cause came on to be heard upon motion of plaintiff for a new trial, before the Court, the Hon. Ernest A. Tolin, United States District Judge, presiding, in the Northern Division, at Fresno, California, on May 11, 1956, and the Court having considered the files, the evidence, the motion, memoranda and argument of counsel, hereby orders that the motion of plaintiff for a new trial be, and is, denied.

Dated: This 1st day of June, 1956.

/s/ ERNEST A. TOLIN,
United States District Judge.

Approved as to form pursuant to Local Rule 7(a)
this 29th day of May, 1956.

KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Plaintiff.

[Endorsed]: Filed June 1, 1956. [224]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Sunland Industries, Inc., a corporation, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 19, 1956. Motions under Rule 52(b) and Rule 59 were made in this action and orders denying said motions were entered on or after May 11, 1956.

Dated: This 6th day of July, 1956.

KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Appellant, Sunland Industries, Inc.,
a Corporation.

[Endorsed]: Filed July 6, 1956. [225]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

The Appellant designates the complete record and all the proceedings and evidence in the action to be contained in the record on appeal in this action. This is to include, all Reporter's Transcripts of the Proceedings which presumably have been filed with the Court inasmuch as the Plaintiff paid the fee for such transcripts. This is also to include all the Minutes of the Court.

Dated: This 6th day of July, 1956.

KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Appellant.

Certificate of service attached.

[Endorsed]: Filed July 6, 1956. [226]

JOINT EXHIBIT No. 1-A
(Admitted in evidence 1/5/56)

United States District Court for the Southern
District of California, Northern Division
No. 1162-ND Civil

SUNLAND INDUSTRIES, INC., a Corporation,
Plaintiff,

vs.

UNITER STATES OF AMERICA,
Defendant.

EXHIBIT TO STIPULATION

It Is Hereby Stipulated, that for the purpose of this proceeding the attached true and correct copy of the Plaintiff's Excess Profits Tax Return for the Taxable Year 1943 is the material referred to in the Stipulation of Facts as Joint Exhibit "1-A," and may be accepted as fact as though incorporated in full within the said Stipulation.

Dated: This 5th day of January, 1956.

KIMBEL, THOMAS, SNELL,
JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Plaintiff.

LAUGHLIN E. WATERS,
United States Attorney;
EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;
Attorneys for Defendant.

/s/ EDWARD R. McHALE,

ST-WAR CREDIT
MADE IT: CC-2
1943
Department
of Revenue Service

UNITED STATES
CORPORATION EXCESS PROFITS TAX RETURN
For Calendar Year 1943

874 1943

or fiscal year beginning 1943, and ending 1944

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

SUNLAND INDUSTRIES INC

P O Box 1669

FRESNO

CALIF.

File
Center
Serial
No. 400524

District
(County)

Cash Check P.O.
First payment

32,367.44

Total

Business group serial number entered on page 1, Form 1120

EXCESS PROFITS TAX COMPUTATION

AUG 20 1948

RECEIVED
JAN 16 1950
PLAIN REJECTED

COLUMN 1
INCOME CREDIT
METHOD

COLUMN 2
INVESTED CAPITAL
CREDIT METHOD

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100

POST-WAR REFUND OF EXCESS PROFITS TAX AND CREDIT FOR DEBT RETIREMENT

Balance of excess profits tax (Item 18 (e), above)

Credit allowable under sections 780 and 781 (10 percent of Item 25) (but in cases where the corporation is not a public utility, see instructions 25-26)

Amount of amounts paid on indebtedness or net reduction in indebtedness under section 780 (10 (1))

Credit for debt retirement allowable under section 783 (40 percent of Item 27, but not in excess of 10 percent of Item 25)

Post-war refund credit (Item 28 minus Item 26)

I, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is being prepared, certify that the information furnished herein is true and correct, and that the return (including any accompanying schedules and statements) is a true and correct statement of all the information respecting the excess profits tax liability of the person for whom this return has been prepared, and that I have not been convicted of a crime involving the preparation of a false return, and that I am not a person who has been convicted of a crime involving the preparation of a false return.

Subscribed and sworn to before me this 15th day of March, 1943.

Signature of officer administering oath (Typed)

CORPORATE SEAL

Signature of person preparing the return (Typed)

I, the undersigned, certify that I have prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true and correct statement of all the information respecting the excess profits tax liability of the person for whom this return has been prepared, and that I have not been convicted of a crime involving the preparation of a false return, and that I am not a person who has been convicted of a crime involving the preparation of a false return.

Subscribed and sworn to before me this 15th day of March, 1943.

Signature of officer administering oath (Typed)

CORPORATE SEAL

Signature of person preparing the return (Typed)

I, the undersigned, certify that I have prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true and correct statement of all the information respecting the excess profits tax liability of the person for whom this return has been prepared, and that I have not been convicted of a crime involving the preparation of a false return, and that I am not a person who has been convicted of a crime involving the preparation of a false return.



QUESTIONS

- (a) Date of incorporation _____ (b) State or country _____
- Collector's office in which your income tax return for the taxable year was filed _____
- Is this a consolidated return? _____ If so, procure from the collector Form 851, Affiliations Schedule, which shall be filed in, sworn to, and signed as a part of the consolidated income tax return.
- In computing the excess profits credit under the invested capital method, do you elect to include in excess profits net income interest received on, or realized by the amount of amortizable bond premium under section 125 attributable to, all Government obligations described in section 22(b)(4) of the Internal Revenue Code? (Answer "yes" or "no") _____
- Are you a transferor or transferee upon an exchange as defined in section 760 or 761 of the Internal Revenue Code? (Answer "yes" or "no") _____
- Does this return involve an adjustment of the excess profits tax liability due to the application of the sections specified in (1) below? (Answer "yes" or "no") _____ If answer is "yes":
- (1) Check the appropriate sections and submit schedules showing computation: 710(a) ☐ 721 ☐ 726 ☐ 731 ☐ 735(b) ☐ 735(c) ☐ 736(a) ☐ 736(b) ☐ (See General Instructions E, F, G, H, and I. (Enter amount of excess profits tax as item 18 (b), page 1.)
- (2) From the schedules submitted under (1) above, enter any tax adjustment which results from the application of each of the following sections: 721, \$ _____; 726, \$ _____; 731, \$ _____; 735(b), \$ _____; 735(c), \$ _____
- (3) From the schedules submitted under (1) above, enter any income adjustment which results from the application of each of the following sections: 721, \$ _____; 731, \$ _____; 736(b), \$ _____; 735(c), \$ _____
- State amount of total assets as of the end of the taxable year. (From Form 1120, page 4, line 8, last column), \$ _____

Schedule A. EXCESS PROFITS NET INCOME COMPUTATION

	COLUMN 1 EXCESS PROFITS METHOD	COLUMN 2 INVESTED CAPITAL CARRY METHOD
1. Normal-tax net income (computed without allowance of credit for income subject to excess profits tax and without allowance of dividends received credit) (item 37, page 1, Form 1120)	25,465.37	25,465.37
2. Net short-term capital gain (do not enter net short-term capital loss)		
3. Adjustment to net operating loss deduction		
4. Decrease in deductions limited by income		
5. 50 percent of interest on borrowed capital	XXXXXX	XX
6. Interest on Government obligations (see question (e) above, for election)	XXXXXX	XX
7. Total of lines 1 to 6	\$	\$
8. Net gain from sale or exchange of capital assets (item 12 (a), page 1, Form 1120)	\$	\$
9. Income from retirement or discharge of bonds, etc.		
10. Refunds and interest on Agricultural Adjustment Act taxes		
11. Recoveries of bad debts		
12. Increase in deductions limited by income		
13. Dividends received credit adjustment (item 13, page 1, Form 1120, excluding dividends received from foreign corporations)		XXXXXX
14. Dividends received credit adjustment (item 13, page 1, Form 1120, excluding dividends received from foreign personal holding companies and dividends received on stock held primarily for sale to customers by a dealer in securities)	XXXXXX	XX
15. Sustainable income of certain industries with depletable resources		
16. Total of lines 8 to 14	\$	\$
17. Excess profits tax net income computed without regard to deductions applicable to life insurance companies (line 7 minus line 16)	\$	\$
18. Deductions applicable to life insurance companies		
19. Excess profits net income computed under income credit method or invested capital credit method (line 16, or line 16 minus line 17 in case of a life insurance company)	2,748.51	2,748.51

Item 20

1936	31,020.19
1937	32,655.74
1938	28,432.50
	<hr/> 72,108.43
11/3	3,070.348
7510	23,027.61
	<hr/> 20,741.85
	<hr/> 210,027.6



Schedule B.—EXCESS PROFITS CREDIT—BASED ON INCOME

Page 1

TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1935, AND BEGINNING JANUARY 1, 1936 (If additional columns are required, attach separate statements)				
	1. Year Ended	2. Year Ended	3. Year Ended	4. Year Ended
	19	19	19	19
Normal-tax (or special-class) net income	\$	\$	\$	\$
Net capital loss used in computing line 1				
Less: Items which are capital assets deducted in computing line 1 as bad debts or as stock determined to be worthless (for taxable years beginning prior to January 1, 1936)				
Net loss from sale or exchange of property other than capital assets deducted in computing line 1 (for taxable years beginning after December 31, 1937)				
Net loss from involuntary conversion of property deducted in computing line 1				
Total of lines 1 to 5	\$	\$	\$	\$
Net capital gain used in computing line 1				
Net gain from sale or exchange of property other than capital assets used in computing line 1 (for taxable years beginning after December 31, 1937)				
Net gain from involuntary conversion of property used in computing line 1				
Total of lines 7 to 9	\$	\$	\$	\$
Difference between lines 6 and 10	\$	\$	\$	\$
Net gain from sale or exchange of capital assets after considering net capital loss carry-over				
Net gain from sale, exchange, or involuntary conversion of property other than capital assets				
Total of lines 11 to 13	\$	\$	\$	\$
Net loss from sale, exchange, or involuntary conversion of property other than capital assets				
Stock and securities of affiliated corporations which became worthless during the taxable year (if included in line 2, 3, or 7)				
Total of lines 15 and 16	\$	\$	\$	\$
Normal-tax (or special-class) net income after applying section 711 (b) (2) (line 14 minus line 17)	\$	\$	\$	\$
Net short-term capital gain after considering net capital loss carry-over (do not enter net short-term capital loss)				
Dividends received credit				
Deductions on account of retirement or discharge of bonds, etc.				
Casualty, demolition, and similar losses not taken into account in computing line 12, 13, or 15				
Depayment of processing tax to vendee				
(a) Abnormal judgment liabilities, etc. (attach statement)				
(b) Abnormal expenditures for intangible drilling and development costs (attach statement)				
(c) Other abnormal deductions (attach statement)				
Capitalization of expenditures for advertising or promotion of goodwill (attach statement)				
Total of lines 18 to 25	\$	\$	\$	\$
Income from retirement or discharge of bonds, etc.	\$	\$	\$	\$
Dividends received from domestic corporations				
Net gain from sale or exchange of capital assets after considering net capital loss carry-over (line 12, above)				
Total of lines 27 to 29	\$	\$	\$	\$
Excess profits net income (line 26 minus line 30)	\$ 31,070.19	\$ 8,265.57	\$ 2,224.85	\$ 2,842.24
Net aggregate of columns 1, 2, 3, and 4				\$ 9,412.52
Decrease in lowest year in base period (attach statement)				\$ 1,007.76
Total of lines 32 and 33				\$ 8,404.76
Average base period net income—General average (line 34 divided by number of months in base period, multiplied by 12)				\$ 2,878.45
Net to line 35 to 40 for computation of average base period net income where there are increased earnings in last half of base period				
Net aggregate of columns 3 and 4, line 31 (see instruction regarding limitation applicable to taxable year ending after May 31, 1940)	\$			
Net aggregate of columns 1 and 2, line 21	\$			
Amount of line 36 over line 37	\$			
One-half of line 38	\$			
Line 36 plus line 39	\$			
Line 40 divided by number of months in second half of base period, multiplied by 12	\$			
Average base period net income—Increased earnings in last half of base period (line 41, or the highest excess profits net income for any taxable year in the base period, whichever is lesser)	\$			\$ 2,878.45
5 percent of line 35 or line 42, whichever is greater	\$			\$ 2,734.52
Net capital addition, \$; or net capital deduction, \$ (attach statement)				
Percent of line 44, if a net capital addition (or 6 percent of line 44, if a net capital reduction)				
Excess profits credit—based on income (line 43 plus line 45, if a net capital addition) (or line 43 minus line 45, if a net capital reduction)	\$			\$ 2,734.52

11-5555-1



Schedule C.—EXCESS PROFITS CREDIT—BASED ON INVESTED CAPITAL

Equity Invested Capital at the Beginning of the Taxable Year
(See Instructions for Schedule C, lines 1 to 12, inclusive)

1. Money paid in for stock, or as paid in surplus, or as a contribution to capital
2. Property paid in for stock, or as paid in surplus, or as a contribution to capital
3. Distributions of earnings and profits in stock of the corporation
4. (a) Accumulated earnings and profits
- (b) Adjustment for transferor's deficit under section 718 (c) (5)
- (c) Increase or decrease under section 761 (d) (1) on account of intercorporate liquidation
- (d) Accumulated earnings and profits (item 4 (a)) as adjusted by item 4 (b) and (c)
5. 25 percent of new capital paid in during a taxable year beginning after December 31, 1949
6. Increase on account of intercorporate liquidation under section 761 (d) (2)
7. Deficit in earnings and profits of another corporation under section 718 (a) (7)
8. Total of lines 1 to 7
9. Less: Distributions made prior to the taxable year not out of accumulated earnings and profits
10. Earnings and profits of another corporation required to be deducted by section 718 (b) (3)
11. Decrease on account of intercorporate liquidation under section 761 (d) (2)
12. Deficit in earnings and profits in invested capital of another corporation (section 718 (b) (5))
13. Total of lines 9 to 12
14. Equity invested capital at beginning of taxable year (line 8 minus line 13)

Average Addition to Equity Invested Capital During the Taxable Year
(See Instructions for Schedule C, lines 1 to 12, inclusive)

15. Money paid in for stock, or as paid in surplus, or as a contribution to capital
16. Property paid in for stock, or as paid in surplus, or as a contribution to capital
17. Distributions of earnings and profits (other than earnings and profits of the taxable year) in stock of the corporation (see line 24, below)
18. 25 percent of new capital
19. Increase on account of intercorporate liquidation under section 761 (d) (2)
20. Deficit in earnings and profits of another corporation under section 718 (a) (7)
21. Total additions in lines 15 to 20
22. Total of lines 14 and 21

Average Reduction in Equity Invested Capital During the Taxable Year
(See Instructions for Schedule C, lines 1 to 12, inclusive)

23. Distributions not out of earnings and profits of the taxable year
24. Stock distributions from accumulated earnings and profits at beginning of year (see line 17, above)
25. Decrease on account of intercorporate liquidation under section 761 (d) (2)
26. Deficit in earnings and profits included in invested capital of another corporation (section 718 (b) (5))
27. Total reductions in lines 23 to 26

(See Instructions for Schedule C, lines 28 to 41, inclusive)

28. Average equity invested capital (line 22 minus line 27)
29. Average borrowed capital (attach schedule)
30. Average borrowed invested capital (50 percent of line 29)
31. Average invested capital (line 28 plus line 30)
32. Total inadmissible assets
33. Total admissible and inadmissible assets
34. Percentage which line 32 is of line 33
35. Reduction on account of inadmissible assets (percent of line 31)
36. Invested capital (line 31 minus line 35)
37. Portion of line 36 (not in excess of \$5,000,000; and credit at 8 percent)
38. Portion of line 36 (over \$5,000,000, but not over \$10,000,000; and credit at 7 percent)
39. Portion of line 36 (over \$10,000,000, but not over \$200,000,000; and credit at 6 percent)
40. Portion of line 36 (over \$200,000,000; and credit at 5 percent)
41. Excess profits credit—based on invested capital (total of lines 37 to 40)

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

/s/ EDWARD R. McHALE,
Attorneys for Defendant.

Summary of Assessments & Collections
With Respect to Plaintiff's
1943 Excess Profits Tax Liability

Table 1: Assessments Prior to 7-1-49. The following table sets forth all the assessments made prior to July 1, 1949, with respect to Plaintiff's 1943 E.P.T. Liability:

Date of Assessment	Amount Assessed With Respect to Tax Liability Exclusive of Any Interest	Amount Assessed With Respect to Interest
May 23, 1944.....	\$129,469.74	
Aug. 20, 1948.....	1,100.59	
Aug. 20, 1949.....		\$217.64

Table 2: Collections Prior to 7-1-49. The following table sets forth all the collections made prior to July 1, 1949, with respect to Plaintiff's 1943 E.P.T. Liability:

Date and Method of Collections	Amount Collected With Respect to Tax Liability Exclusive of Any Interest	Amount Collected With Respect to Interest
Mar. 15, 1944; timely payment by plaintiff	\$32,367.44	
June 15, 1944; timely payment by plaintiff	32,367.44	
Sept. 15, 1944; timely payment by plaintiff	32,367.44	
Dec. 14, 1944; timely payment by plaintiff	32,367.44	
Sept. 13, 1948; voluntary payment by plaintiff	1,100.59	
Sept. 13, 1948; voluntary payment by plaintiff		\$217.69

Table 3: Assessments after 7-1-49. The following table sets forth all the assessments made after July 1, 1949, with respect to Plaintiff's 1943 E.P.T. Liability:

Date of Assessment	Amount Assessed With Respect to Tax Liability Exclusive of Any Interest	Amount Assessed With Respect to Interest
Jan. 3, 1950.....	\$58,089.75	
Jan. 3, 1950.....		\$20,040.96
Sometime in Nov., 1950.....	8,321.67	
Sometime in Nov., 1950.....		1,451.22

Table 4: Collections after 7-1-49. The following table sets forth all the collections made after July 1, 1949, with respect to Plaintiff's 1943 E.P.T. Liability:

Date and Method of Collections	Amount Collected With Respect to Tax Liability Exclusive of Any Interest	Amount Collected With Respect to Interest
Dec. 14, 1949; payment.....	\$58,089.75	
Dec. 14, 1949; payment.....		\$20,040.96
Sometime in Nov., 1950, offset by various credits	8,321.67	
Sometime in Nov., 1950, offset by various credits		1,451.22

JOINT EXHIBIT No. 3-C
(Admitted in evidence 1/5/56)

United States District Court for the Southern
District of California, Northern Division
No. 1162-ND Civil

SUNLAND INDUSTRIES, INC., a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

EXHIBIT TO STIPULATION

It Is Hereby Stipulated, that for the purpose of this proceeding the attached true and correct copy of the Plaintiff's Application for Relief Under Sec. 722 for the Taxable Year 1942 is the material referred to in the Stipulation of Facts as Joint Exhibit "3-C," and may be accepted as fact as though incorporated in full within the said Stipulation.

Dated: This 5th day of January, 1956.

KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Plaintiff.

LAUGHLIN E. WATERS,
United States Attorney,
EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division,

/s/ EDWARD R. McHALE,
Attorneys for Defendant.

Form 991
U.S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
(Revised January 1945)

RECEIVED
722 SEP 15 1943

APPLICATION FOR RELIEF UNDER SECTION 722
OF THE INTERNAL REVENUE CODE

7576

(To be executed and filed in duplicate)

Durham Sulphur Co. Box 94
Name of corporation Address of corporation

Applicant makes application for relief under section 722 of the Internal Revenue Code with respect to its excess profits tax taxable year indicated below, and in support of such application submits the following information:

1. Date of incorporation August 1 1930 2. State or country California

3. Excess profits tax taxable year for which the benefits of section 722 are claimed 1942

4. Collection district in which the excess profits tax return for the year was filed Dist. of California

5. Date filed May 15 1944 & period of extension, if any, granted for filing return 60 days from 15 43

6. Excess profits tax shown upon the excess profits tax return for the year 93487.89
(Computed prior to the deferment under section 710 (a) (5), to the foreign-tax credit under section 729, to the credit for debt retirement under section 783, and to the adjustment under section 734.1)

7. Excess profits tax computed after application of section 722 none
(Computed prior to the deferment, to the credits and to the adjustment as provided in line 6.)

8. Reduction in tax under section 722 (line 6 minus line 7) 93487.89

9. Adjusted excess profits net income computed without regard to section 722 105875.43

10. Normal-tax net income computed without the credit provided in section 26 (a) for income subject to excess profits tax 136220.91

11. Percentage which line 9 is of line 10 76.26

12. If line 11 exceeds 50 percent, amount of tax deferred under section 710 (a) (5) (33 percent of line 8) (enter as Num 17, page 1, Form 1121) 30850.00

13. Total net relief claimed with respect to tax shown on return (line 6 minus line 12) 62637.89

14. Total excess profits tax for the taxable year paid at or prior to time this application is filed 46777.67

15. Amount of refund or credit for which this application is a claim (see instruction III) 93487.89

IF APPLICATION FILED AS A RESULT OF DEFICIENCY

16. Excess profits tax shown in preliminary notice or notice of deficiency

17. Excess profits tax after application of section 722

18. Reduction in tax under section 722 (line 16 minus line 17)

19. If any adjustments have been made subsequent to the filing of the return, enter the adjusted amount.

20. Amount of reduction of tax may not exceed deficiency finally determined without reference to section 722.

Clearing Div. Sec. 722
Section 732 Notices: Allowed ☒ Rej. ☒
To agent ☒ In part ☒
To taxpayer 5/11/50 In full ☒
Closed 5/11/50
Approved 5/11/50
Approved 5/11/50

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10/30/50

RECEIVED
LUDWIG W. E.
OCT 2 - 1943
TILES SECTION



SCHEDULE A—CONSTRUCTIVE BASE PERIOD NET INCOME

Has an application for a constructive average base period net income been made for a prior taxable year? 44

If so, state year or years 1944

Has a constructive average base period net income been finally determined and used in connection with a prior taxable year? **No**

2. If answer to line 2 is "yes," state:

- (a) Amount determined for use in computing excess profits tax for prior year
- (b) Year for which constructive average base period net income used in computing excess profits tax
- (c) Date of determination of constructive average base period net income

(d) By whom determination was made.....

(e) Reason for claim for constructive average base period net income for use in the taxable year other than the amount set forth in (a) (attach statement).

(5) In the case of an affiliated group filing consolidated excess profits tax returns, have any new members been acquired by the group, or have any former members departed from the group after the date upon which

each constructive average base period net income was determined?
particulars.

If answer is "yes," attach

Year	4 months
------	----------

4. Excess profits net income or deficit in excess profits net income for each taxable year in the base period, computed without regard to section 722.

1936 : 31020.19

1937 1 2265674

- 1425 : 2024.85

1439 ~~1-244245~~

3 74135-28

4-24-52-82

Average base period net income determined without regard to section 722

(a) Is the benefit of section 713 (e) (1) (relating to exclusion of deficit or to increase in lowest year in base period) claimed?

(b) Is the benefit of section 713 (f) (relating to increased earnings in last half of base period) claimed? ☐

(c) If answer to (a) or (b) is "yes," furnish computation.

Amount of constructive average base period net income claimed for use in computing excess profits tax for taxable

--- (Furnish particulars supporting amount claimed and details involved in computation)

82729-4

Has Supplement A been availed of in determining average base period net income?

Has a separate constructive average

has period not income been finally determined for any component prior to the time this application is made? DO Attach
 records showing former names, addresses, and all pertinent information for each component corporation for each year of existence
 necessary to determination of application of section 722.

(c) If business was commenced during base period or after December 31, 1939, is business a continuation in whole or in part of previously existing business? *Business commenced after base period*

26) If answer to (a) is "yes," furnish particulars.

(e) Is the taxpayer a member of an affiliated group making a consolidated excess profits tax return? no

6) If the answer to (a) is "yes," is the affiliated group filing a consolidated excess profits tax return making application for relief and

722?

(a) If answer to (a) and (b) is "yes," state:

(1) First taxable year for which a consolidated excess profits tax return was made

(2) Whether a constructive average base-period net income has been finally determined for any member of the group

(8) Names and addresses of each member of the group, and furnish all pertinent information necessary to determine construct average base period net income of such group.

of the taxpayer came into existence after December 31, 1939, state date after which capital additions and capital reductions were a

taken into account in computing constructive average base period net income. See 8(a) above.

If the benefits of section 711 (a) (1) (C) or 711 (a) (2) (K) (relating to nontaxable income of certain industries with depleted resources) are claimed, attach schedule showing the computation of, and state the fair and just amount of:

a) Normal output der ig in d in section 735 (a) (5)

b) Normal unit profit p (a) (9), \$ 100,000 per 100,000 units



SCHEDULE B—TAXPAYERS ENTITLED TO THE EXCESS PROFITS CREDIT BASED ON INCOME

If the excess profits tax is claimed to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 718 (or Supplement A, if the taxpayer computes its average base period net income pursuant to Supplement A), check one or more of the following reasons and supply the general information called for in the instructions as well as that indicated below:

- ☐ 1. Normal production, output, or operation was interrupted during the base period because of unusual and temporary events (section 722 (b) (1)).
- (a) Describe the events and time of occurrence.
- (b) State taxable years in the base period during which production, output, or operations were affected.
- ☒ 2. The business of the taxpayer was depressed during the base period or the taxpayer was a member of an industry which was depressed during the base period because of temporary and unusual economic events (section 722 (b) (2)).
- (a) Describe the temporary economic events unusual in the case of the taxpayer or an industry of which it was a member.
- (b) If claim of depression is based on membership in depressed industry, describe industry, and furnish names and addresses of other members of such industry.
- See explanatory text Exhibit A to Schedule B attached*
- ☐ 3. The business of the taxpayer was depressed in the base period because of membership in an industry affected by conditions subjecting the taxpayer to:
- ☐ A profits cycle differing materially from the general business cycle (section 722 (b) (3) (A)), or
- ☐ Sporadic and intermittent periods of profits inadequately represented in the base period (section 722 (b) (3) (B)).
- (a) Describe character of the industry and furnish names and addresses of other members of the industry.
- (b) Furnish data establishing that the taxpayer was depressed by reason of an unusual profits cycle, or
- (c) Furnish data establishing that the taxpayer was depressed by reason of realization of sporadic profits inadequately represented in the base period.
- ☒ 4. The business of the taxpayer was commenced or there was a change in the character of the business immediately prior to or during the base period (section 722 (b) (4)).
- (a) On what date did commencement of business or change in character of business occur? *1936 - new territories*
- (b) If change in character of the business has occurred, submit statement of
- (1) Nature of change in character of business. *1937 - move of furniture and*
- (2) Portion of the definition in section 722 (b) (4) within which such change is claimed to have occurred. *1939 - new plant added*
- (3) Evidence supporting contention that average base period net income does not reflect normal operations for the entire base period.
- (c) Did the business reach, by the end of the base period, the earning level it would have reached if the business had been commenced, or if the change in the character of the business had occurred, 2 years prior to the time the commencement or change occurred? *no* If answer is "no," furnish particulars. *See explanatory text Exhibit A to Schedule B attached*
- (d) Was change in capacity for production or operation of business consummated during a taxable year ending after December 31, 1939, as a result of a course of action to which taxpayer was committed prior to January 1, 1940? *yes*
- (e) If answer to (d) is "yes": *See explanatory text Exhibit A to Schedule B attached*
- (1) State date upon which such change was consummated and extent to which income for such year reflects such change.
- (2) Submit evidence of commitment to a course of action prior to January 1, 1940.
- (3) Attach schedule showing net capital addition or net capital reduction (section 713 (g) (1) or (2)) and the amount of money or property expended after the beginning of the first excess profits tax taxable year under the Internal Revenue Code in changing the capacity for production or operation of the business.
- ☒ 5. Other factors producing an average base period net income which is an inadequate standard of normal earnings and which are not inconsistent with the principles and limitations of section 722 (b) (section 722 (b) (5)).
- (a) Describe other factors claimed to affect business during the base period and to result in an average base period net income which is an inadequate standard of normal earnings.
- See explanatory text Exhibit A to Schedule B attached*

SCHEDULE C—TAXPAYERS NOT ENTITLED TO THE EXCESS PROFITS CREDIT BASED ON INCOME

If the excess profits tax is claimed to be excessive and discriminatory in the case of a taxpayer not entitled to use the excess profits credit based on income pursuant to section 718 (or Supplement A), check one or more of the following reasons and supply the general information called for in the instructions as well as that indicated below:

- ☐ 1. The business of the taxpayer is of a class in which intangible assets not includible in invested capital under section 718 make important contributions to income (section 722 (c) (1)).
- (a) Describe character of intangible assets.
- (b) State names and addresses of other corporations believed to be in the same class of business where intangible assets of a similar character make important contributions to income.
- ☐ 2. The business of the taxpayer is of a class in which capital is not an important income-producing factor (section 722 (c) (2)).
- (a) Describe nature of the business and explain why capital is not an important income-producing factor.
- (b) State names and addresses of other corporations believed to be in the same class of business in which capital is not an important income-producing factor.
- ☐ 3. The invested capital of the taxpayer is abnormally low (section 722 (c) (3)).
- (a) Describe circumstances causing invested capital to be abnormally low



AFFIDAVIT

We, the undersigned officers of the corporation for which this application is made, being duly sworn, each for himself poose and says that the statements made herein (including any accompanying schedules and statements) are, to the best of his knowledge and belief, true, correct, and complete statements of facts made in good faith pursuant to the requirements of section 722 of the Internal Revenue Code and the regulations issued thereunder.

[CORPORATE SEAL]

J. L. Harper President
S. L. Brown Sec. Treas.
 (Title)
 (Title)

Subscribed and sworn to before me this 13 day of September, 1943

E. C. Bradford
 (Signature of officer administering oath)

Notary Public
 (Title)



Sunland Sulphur Co.
 Fresno, Calif.

Summary of Profit and Loss accounts for base period

Per reconstructed Profit and Loss statements Excess
 Profits for
 per returns

		<u>Sunland</u>	<u>Sulphur</u>	<u>Total</u>	
year 1936	A	93108.79	7099.57	100208.36	
1937	B	71640.44	15442.49	87082.93	
1938	C	81901.16	338.54	82239.70	
1939	D	17759.35	1040.94	17800.29	
Total		324409.74	21819.66	346229.40	

Colo Supply stores
 merged with Sunland
 Sulphur Co 10-31-39
 by statutory authority

average for base period

8659.35

Excess profits credit 95%

82229.48

1940 E. P. Tax Income
 E. P. Tax Credit
 carry over

33516.33

82229.48

48713.15

463.76

1941 E. P. Tax Income
 E. P. Tax Credit
 carry over

53429.19

82229.48

28790.29

94328

Total carry over to 1942

77503.44

1942 E. P. Tax Income
 E. P. Tax Credit
 Specific Credit
 Total Credit
 no E. P. Tax on basis
 of reconstructed P&L

82229.48

500000

91229.48

136220.71

93477.87

164732.92



JOINT EXHIBIT No. 4-D

(Admitted in evidence 1/5/56)

United States District Court for the Southern
District of California, Northern Division
No. 1162-ND Civil

SUNLAND INDUSTRIES, INC., a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

EXHIBIT TO STIPULATION

It Is Hereby Stipulated, that for the purpose of this proceeding the attached true and correct copy of the Plaintiff's Application for Relief Under Sec. 722 for the Taxable Year 1943 is the material referred to in the Stipulation of Facts as Joint Exhibit "4-D," and may be accepted as fact as though incorporated in full within the said Stipulation.

Dated: This 5th day of January, 1956.

KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Plaintiff.

LAUGHLIN E. WATERS,
United States Attorney,
EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division,

/s/ EDWARD R. McHALE,
Attorneys for Defendant.



RECEIVED

Page 1

APPLICATION FOR RELIEF UNDER SECTION 722 OF THE INTERNAL REVENUE CODE

42900

(To be completed and filed in duplicate)

SECTION 722

SUNLAND INDUSTRIES, INC. of P. O. Box 363, Fresno, California
formerly Sunland Corporation Co. (Address of corporation)
I hereby make application for relief under section 722 of the Internal Revenue Code with respect to its excess profits tax taxable year indicated
below, and in support of such application submit the following information:

1. Date of incorporation August 1, 1930 2. State or country California

3. Excess profits tax taxable year for which the benefits of section 722 are claimed 1943

4. Collection district in which the excess profits tax return for the year was filed First in California

5. Date filed March 15, 1944 period of extension, if any, granted for filing returns None

6. Excess profits tax shown upon the excess profits tax return for the year \$123,238.42
(Computed prior to the deferment under section 710 (a) (5), to the foreign tax credit under section 729, to the
credit for debt retirement under section 783, and to the adjustment under section 734.)

7. Excess profits tax computed after application of section 722 \$147,744.10
(Computed prior to the deferment, to the credits and to the adjustment as provided in line 6.)

8. Reduction in tax under section 722 (line 6 minus line 7) \$45,494.32

9. Adjusted excess profits net income computed without regard to section 722 \$254,951.77

10. Normal tax net income computed without the credit provided in section 26 (e) for income
subject to excess profits tax \$266,995.13

11. Percentage which line 9 is of line 10 95 %

12. If line 11 exceeds 50 percent, amount of tax deferred under section 710 (a) (5) (38 percent of line 8) (enter as
line 1, page 1, Form 1121) \$63,768.68

13. Total net relief claimed with respect to tax shown on return (line 8 minus line 12) \$116,274.36

14. Total excess profits tax for the taxable year paid at or prior to time this application is filed \$129,469.74

15. Amount of refund or credit for which this application is a claim (see Instruction III) None

IF APPLICATION FILED AS A RESULT OF DEFICIENCY

1. Excess profits tax shown in preliminary notice or notice of deficiency \$

2. Excess profits tax after application of section 722 \$

3. Reduction in tax under section 722 (line 16 minus line 17) \$

* If any adjustments have been made subsequent to the filing of the return, enter the adjusted amount.
* Amount of reduction of tax may not exceed deficiency finally determined without reference to section 722.

16-5000-3

Section 722	Rel <input checked="" type="checkbox"/>
To agent	
To taxpayer <u>7/11/44</u>	
Closed	

11/11/44 OCT 10 1950

SCHEDULE A—CONSTRUCTIVE BASE PERIOD NET INCOME

1. Has an application for a constructive average base period net income been made for a prior taxable year? Yes

If so, state year or years 1940- 1941 - 1942

2. Has a constructive average base period net income been finally determined and used in connection with a prior taxable year? No

3. If answer to line 2 is "yes," state:

(a) Amount determined for use in computing excess profits tax for prior year..... \$

(b) Year for which constructive average base period net income used in computing excess profits tax.....

(c) Date of determination of constructive average base period net income.....

(d) By whom determination was made.....

(e) Reason for claim for constructive average base period net income for use in the taxable year other than the amount set forth in (a) (attach statement).

(f) In the case of an affiliated group filing consolidated excess profits tax returns, have any new members been acquired by the group, or have any former members departed from the group after the date upon which

such constructive average base period net income was determined? If answer is "yes," attach particulars.

4. Excess profits net income or deficit in excess profits net income for each taxable year in the base period, computed without regard to section 722.

Year	Amount
1936	\$ 31,020.19
1937	\$ 32,656.74
1938	\$ 2,024.85
1939	\$ 28,434.50
Total	\$ 94,135.28

5. Average base period net income determined without regard to section 722..... \$ 23,335.52

(a) Is the benefit of section 713 (a) (1) (relating to exclusion of deficit or to increase in lowest year in base period) claimed?

(b) Is the benefit of section 713 (f) (relating to increased earnings in last half of base period) claimed?

(c) If answer to (a) or (b) is "yes," furnish computation.

6. Amount of constructive average base period net income claimed for use in computing excess profits tax for taxable year. (Furnish particulars supporting amount claimed and details involved in computation.)..... \$ 90,201.74

7. Has Supplement A been availed of in determining average base period net income? Has a separate constructive average

base period net income been finally determined for any component prior to the time this application is made? No Attach schedule showing former names, addresses, and all pertinent information for each component corporation for each year of existence necessary to determination of application of section 722.

8. (a) If business was commenced during base period or after December 31, 1939, is business a continuation in whole or in part of a previously existing business? Commenced prior to base period

(b) If answer to (a) is "yes," furnish particulars.

9. (a) Is the taxpayer a member of an affiliated group making a consolidated excess profits tax return? No

(b) If the answer to (a) is "yes," is the affiliated group filing a consolidated excess profits tax return making application for relief under

section 722?

(c) If answer to (a) and (b) is "yes," state:

(1) First taxable year for which a consolidated excess profits tax return was made

(2) Whether a constructive average base-period net income has been finally determined for any member of the group

(3) Names and addresses of each member of the group, and furnish all pertinent information necessary to determine constructive average base period net income of such group.

10. If the taxpayer came into existence after December 31, 1939, state date after which capital additions and capital reductions were not taken into account in computing constructive average base period net income See B (a) above

11. If the benefits of section 711 (a) (1) (I) or 711 (a) (2) (K) (relating to nontaxable income of certain industries with depletable resources) are claimed, attach schedule showing the computation of, and state the fair and just amount of:

(a) Normal output during the base period as defined in section 735 (a) (5)

(b) Normal unit profit as defined in section 735 (a) (1), \$ per

SCHEDULE B—TAXPAYERS ENTITLED TO THE EXCESS PROFITS CREDIT BASED ON INCOME

If the excess profits tax is claimed to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713 (or Supplement A, if the taxpayer computes its average base period net income pursuant to Supplement A), check one or more of the following reasons and supply the general information called for in the instructions as well as that indicated below:

- ☐ 1. Normal production, output, or operation was interrupted during the base period because of unusual and peculiar events (section 722 (b) (1)).
- (a) Describe the events and time of occurrence.
- (b) State taxable years in the base period during which production, output, or operations were affected.
- ☒ 2. The business of the taxpayer was depressed during the base period or the taxpayer was a member of an industry which was depressed during the base period because of temporary and unusual economic events (section 722 (b) (2)).
- (a) Describe the temporary economic events unusual in the case of the taxpayer or an industry of which it was a member.
- (b) If claim of depression is based on membership in depressed industry, describe industry, and furnish names and addresses of other members of such industry.
- See Exhibit A to Schedule B attached
- ☐ 3. The business of the taxpayer was depressed in the base period because of membership in an industry affected by conditions subjecting the taxpayer to:
- ☐ A profits cycle differing materially from the general business cycle (section 722 (b) (3) (A)), or
- ☐ Sporadic and intermittent periods of profits inadequately represented in the base period (section 722 (b) (3) (B)).
- (a) Describe character of the industry and furnish names and addresses of other members of the industry.
- (b) Furnish data establishing that the taxpayer was depressed by reason of an unusual profits cycle, or
- (c) Furnish data establishing that the taxpayer was depressed by reason of realization of sporadic profits inadequately represented in the base period.
- ☒ 4. The business of the taxpayer was commenced or there was a change in the character of the business immediately prior to or during the base period (section 722 (b) (4)).
- See Exhibit A to Schedule B attached
- (a) On what date did commencement of business or change in character of business occur?
- (b) If change in character of the business has occurred, submit statement of:
- (1) Nature of change in character of business.
- (2) Portion of the definition in section 722 (b) (4) within which such change is claimed to have occurred.
- (3) Evidence supporting contention that average base period net income does not reflect normal operations for the entire base period.
- (c) Did the business reach, by the end of the base period, the earning level it would have reached if the business had been commenced, or if the change in the character of the business had occurred, 2 years prior to the time the commencement or change occurred? If answer is "no," furnish particulars.
- (d) Was change in capacity for production or operation of business consummated during a taxable year ending after December 31, 1939, as a result of a course of action to which taxpayer was committed prior to January 1, 1940?
- (e) If answer to (d) is "yes":
- (1) State date upon which such change was consummated and extent to which income for such year reflects such change.
- (2) Submit evidence of commitment to a course of action prior to January 1, 1940.
- (3) Attach schedule showing net capital addition or net capital reduction (section 713 (g) (1) or (2)) and the amount of money or property expended after the beginning of the first excess profits tax taxable year under the Internal Revenue Code in changing the capacity for production or operation of the business.
- ☒ 5. Other factors producing an average base period net income which is an inadequate standard of normal earnings and which are not inconsistent with the principles and limitations of section 722 (b) (section 722 (b) (5)).
- (a) Describe other factors claimed to affect business during the base period and to result in an average base period net income which is an inadequate standard of normal earnings.
- See Exhibit A to Schedule B attached

SCHEDULE C—TAXPAYERS NOT ENTITLED TO THE EXCESS PROFITS CREDIT BASED ON INCOME

If the excess profits tax is claimed to be excessive and discriminatory in the case of a taxpayer not entitled to use the excess profits credit based on income pursuant to section 713 (or Supplement A), check one or more of the following reasons and supply the general information called for in the instructions as well as that indicated below:

- ☐ 1. The business of the taxpayer is of a class in which intangible assets not includible in invested capital under section 718 make important contributions to income (section 722 (c) (1)).
- (a) Describe character of intangible assets.
- (b) State names and addresses of other corporations believed to be in the same class of business where intangible assets of a similar character make important contributions to income.
- ☐ 2. The business of the taxpayer is of a class in which capital is not an important income-producing factor (section 722 (c) (2)).
- (a) Describe nature of the business and explain why capital is not an important income-producing factor.
- (b) State names and addresses of other corporations believed to be in the same class of business in which capital is not an important income-producing factor.
- ☐ 3. The invested capital of the taxpayer is abnormally low (section 722 (c) (3)).
- (a) Describe circumstances causing invested capital to be abnormally low.



AFFIDAVIT

We, the undersigned officers of the corporation for which this application is made, being duly sworn, each for himself depose and says that the statements made herein (including any accompanying schedules and statements) are, to the best of his knowledge and belief, true, correct, and complete statements of facts made in good faith pursuant to the requirements of section 722 of the Internal Revenue Code and the regulations issued thereunder.

[CORPORATE SEAL]

William H. [unclear]
(Name)

Pres.
(Title)

William H. [unclear]
(Name)

Pres.
(Title)

Subscribed and sworn to before me this

9

day of

March

1946

Ernest [unclear]
(Signature of officer administering oath)

(Title)



In the United States District Court, Southern
District of California, Northern Division

No. 1162-ND

SUNLAND INDUSTRIES, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Honorable Ernest A. Tolin, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff:

KIMBLE, THOMAS, SNELL, JAMISON
& RUSSELL, By
WILLIAM N. SNELL, ESQ., and
MICHAEL F. OGLO, ESQ.

For the Defendant:

LAUGHLIN E. WATERS,
United States Attorney, By
EDWARD R. McHALE,
Assistant United States Attorney, Chief of Tax Di-
vision.

January 5, 1956—10:00 A.M.

The Clerk: Case No. 1162-ND, Sunland In-
dustries, Inc., v. United States of America.

Mr. Snell: William N. Snell and Michael F. Oglo for the plaintiff.

Mr. McHale: Edward R. McHale ready for the defendant.

Mr. Snell: If the court please, I would like to make a brief opening statement.

This case arises under the World War II Excess Profits Tax Act. This act was originally enacted in 1940, and it was successively amended by several revenue acts and finally repealed in 1945. The particular provisions which are involved were enacted as a part of the 1942 Revenue Act which became effective in October of 1942. The law was unique and complex. It was quite complicated. And, of course, there was very little time to have rulings and judicial decisions and the like that would make the responsibilities of the taxpayer and the Government clear at that time.

In like manner, the regulations were promulgated under these particular sections becoming effective in March of 1943.

The taxable year in issue in this case is the taxable year 1943, the return for which was filed in March of 1944.

In this action the plaintiff is seeking a refund of [2*] excess-profits taxes which were paid for 1943. When the return was filed it disclosed a taxable income of approximately \$250,000 and showed a total excess-profits taxability of approximately \$200,000. The exact amount was one hundred and ninety-three thousand some-odd dollars.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

At the time of filing a return, or at the time payments would have become due, the plaintiff paid only \$130,000 of this liability. The balance was paid on December 14, 1949, over six years later. And it is this balance of payment of some \$60,000 to \$70,000 that the plaintiff is seeking the refund of in this action.

In addition to the principal of tax, by the time the tax was paid the statutory interest had run on this payment to a sum of approximately \$20,000. And that was also paid on December 14, 1949. The plaintiff is also seeking a refund of that interest.

Then in addition the plan of taxation under the revenue laws provides that when a refund becomes due to a taxpayer he is entitled to interest on the amount paid, running from the date of payment. And we are also seeking that statutory interest.

The facts of the case have been made the subject of a written stipulation which we will introduce as a joint stipulation this morning. There is no substantial controversy regarding the relevant facts. These facts plaintiff feels [3] will prove our contentions as set forth in the pleadings.

Now, there are perhaps some differences of opinion between the defendant and the plaintiff as to the relevance and the materiality of the facts we have stipulated to, and for that reason we have reserved to both parties the right to object to the materiality and the relevance of these stipulated facts. It is our understanding that such objections will be made in briefs which we propose will be filed, and that

normal commercial situation the statute is simply a procedural bar. It does not discharge the liability. If the liability is paid, the obligee is entitled to keep it. The obligor has no right to refund.

Under the tax laws Congress saw fit to enact a section into the Revenue Code, 377(a)(2), which provides that if a tax is paid after the applicable statute of limitations has expired, that tax is to be considered illegally assessed and [6] collected, and shall be refunded.

In the ordinary statute-of-limitations case it is generally assumed also that the bar of the statute is available to the party to be benefited, whether or not the amount involved is, in justice and fairness, due and payable. While we feel the same principle applies to this case, the plaintiff does not concede that the amount here involved should be considered due and payable, in justice and fairness.

And the plaintiff wishes to point out that the particular law involved, the World War II Excess Profits Tax Act, was a rather harsh and inequitable law; that its harshness and inequity was not applied generally to all taxpayers covered by it but in the case of the small corporations, such as the plaintiff, the harshness and inequity was much greater than in the case of the larger corporations.

I would also like to point out that the plan of limitation adopted by Congress is a double-edged sword, applying in one case in favor of the Government and in another in favor of the taxpayer; and it is also our position that the same principle should govern in both cases.

The specific issue involved in this case is whether the general statute of limitations contained in Section 275(a) of the Revenue Code applies to this payment that was made in December of 1949, or whether it was governed by a special statute of limitations contained in 710(a)(5) of the Internal [7] Revenue Code of 1939. The plaintiff's contention is that the general statute controlled and that the general statute had expired.

There is a third possibility which the plaintiff puts forward, that if the amount paid was not governed in itself entirely by the general statute, it was governed in part by the general statute and in part by the special statute.

I might say, by way of clarification of the facts, that the time between the filing of the return and the ultimate payment was consumed by giving consideration to a relief claim, and the relief claim was made under Section 722, which again, I think it is fair to say, is a very complex law.

The 722 sections, which are generally described as excess-profits-tax-relief sections, was one of the most complex and one of the most difficult. And it again is plaintiff's contention that the relief provisions have no direct bearing on this case. I believe that it would be the Government's contention that they do.

But, as you have suggested, we have endeavored to present a question of law, and we do not feel that consideration should be given by the court to all of the facts and contentions which were involved in

the question of whether the benefits of Section 722 were available to this plaintiff. We have tried to eliminate that. Of necessity, it does come in in an oblique manner, but it is not necessary to [8] consider the rights of the parties or what was or should have been the outcome of those provisions.

I believe that concludes my opening statement.

Mr. McHale, do you wish to add to what I have said?

Mr. McHale: I think Mr. Snell made a very clear explanation to the court of what the issue is. And it is the Government's contention that the special statute of limitations which was explained to your Honor in the brief applies, and the assessment of the tax and payment of the tax were all timely made, and therefore the plaintiff is not entitled to a refund; that if there were any requirement in the regulations issued by the Secretary of the Treasury that the tax be assessed by a particular time, under the particular facts of this case, the Commissioner waived the requirements of the regulations, which he could do, and the tax was assessed timely.

The Court: Is this case entirely a statute-of-limitations matter?

Mr. McHale: Yes, your Honor.

The Court: Suppose there were no question as to the question of statute of limitations. Has there been an overpayment of tax?

Mr. McHale: No, your Honor. That issue is not part of this case. I mean, the Commissioner made a determination that there hadn't, and—— [9]

Mr. Snell: Well, if the court please, I would like to say that that might be the subject of a difference of opinion but that this would not be the forum in which to try that particular issue.

I think that is a fair statement of the situation——

Mr. McHale: Yes, I think so.

Mr. Snell: ——that under the statute this would not be the forum in which to try the question other than the statute of limitations.

Mr. McHale: Under 722 the excess profits tax, as your Honor knows, is restricted to the Tax Court for determination. The District Court has no jurisdiction over 722 cases. That exclusively rests in the Tax Court. The only reason excess profits comes in this court is on the statute-of-limitations issue.

The Court: Then so far as this particular court is concerned, all we must determine is the statute-of-limitations question.

Mr. Snell: That is correct, your Honor.

The Court: Have you provided in your stipulation for briefing time?

Mr. Snell: No, your Honor. We had anticipated that we would ask for briefs on a 30 days, 30 days, 20 days basis.

The Court: Is that acceptable? [10]

Mr. McHale: That is acceptable, your Honor.

The Court: Is that going to rush anyone unduly?

Mr. Snell: I do not believe so.

The Court: I want a pretty good brief, and I don't want you to have to sit up until midnight to meet a deadline.

Mr. Snell: I believe we can submit our opening brief in 30 days. There may be a question on answering Mr. McHale's brief.

I would like to make this offer, as far as the plaintiff is concerned: If the Court feels it would like to have oral argument after the briefs have been submitted, we would be very pleased to appear in Los Angeles for oral argument.

Mr. McHale: I think the time is ample, your Honor. And if by chance they want additional time after my brief, I will be glad to consent.

The Court: There will be no problem, that is, no insurmountable problem, in arranging for time for oral argument. It might be that the court will feel that it would like to have particular phases of the briefs expanded upon.

We do have the present situation which the judges of the court are faced with, in that there appears to be in many areas—I haven't noticed it in Fresno—a sort of chamber-of-commerce philosophy that various districts should be broken down in a great number, and a great number of new [11] ones created. As you know, we presently have some ninety-odd District Courts of the United States, and they have many divisions. So the various judicial conferences to which the district judges belong have undertaken to preserve the autonomy of the various divisions of the district to the extent they do obtain, in order to keep a proper respect for having local cases heard in the locality where they arise.

But you are Fresno counsel. aren't you?

Mr. Snell: Yes, your Honor.

The Court: And you, Mr. McHale, come from Los Angeles to Fresno occasionally.

Mr. McHale: Yes, your Honor.

The Court: So, if need for further argument develops, I am afraid that in order to keep consistent with the policy of the court I will have to come back here someday and hear it. But I come here occasionally, too, and we will just get together on some date that is mutually acceptable so that there will not be any undue travel demands made for this particular case.

Mr. Snell: Well, that, of course, would suit counsel for the plaintiff because this is home for me. But whatever is convenient for Mr. McHale and the court——

Mr. McHale: The United States Attorney will be present wherever the court wishes it set.

The Court: Is there anything further in this case today? [12]

Mr. Snell: I have not offered in evidence the stipulation, your Honor. I have a few short comments regarding that matter.

The original stipulation was not given an exhibit number, and we gave to the exhibits to the stipulation exhibit numbers starting with 1-A. They are joint exhibits. I don't know how we are to handle that as a matter of procedure, but I would like to now offer in evidence a document entitled, "Stipulation of Facts," together with seven separate documents entitled Exhibits 1-A through 7-G, which are

exhibits to the stipulation of facts and are submitted as exhibits, joint exhibits to the joint stipulation of facts.

Mr. McHale: Yes, subject to the objections that Mr. Snell mentioned.

The Court: Is it going to be necessary for this court to make findings of fact?

Mr. McHale: Well, I understand the civil rule provides in every civil case tried without a jury that findings must be made, although——

The Court: Will, I think the law requires it unless findings be waived. Sometimes opinions of course have been considered by the appellant court to suffice findings. But where you have agreed by stipulation as to what the facts are, I wonder if you want findings in this case.

Mr. McHale: I think so. I think there may be some [13] ultimate facts that should be found.

The Court: I suppose that would be a natural result from the fact that there are going to be objections to relevancy and materiality which will come along with your briefs.

With that in mind, I have always found it very helpful, particularly in tax cases or other cases of a technical nature, to know exactly what facts the various parties to the case feel must be found by the court in order to support their position. So may I ask you in your briefs to please submit a proposed finding of facts so that I can see what facts in the formal findings the court would have to find in order to sustain your position.

Mr. Snell: We will be pleased to do so.

The Court: Do you have an objection to that procedure?

Mr. McHale: No. I am quite willing to do so.

The Court: Mr. Hochman was bewailing it here yesterday. He says whenever he has done that—and there are several judges who are now asking for that—that he has lost. But I still think it does help the judge to direct his thinking to the problems a bit more acutely than if we do not have the actual findings which the judge will have to make to sustain a particular position.

Mr. McHale: May I ask this, your Honor: Some portions of the stipulation, could they be incorporated by reference in the proposed findings rather than to set them out all over [14] again?

The Court: Yes, if you can do that so I will not need, say, these two tables and need to run around from one to the other, looking at the various exhibits.

Mr. McHale: I was thinking whether the sort of thing such as jurisdictional facts would be necessary for either party to put in the findings.

The Court: We will skip those.

Mr. McHale: Payment and demand for refund.

The Court: Those things will not be necessary. I don't want the findings in final form, but the findings on the tax controversy, the statute-of-limitations controversy, is what I have in mind. Then whoever prevails can prepare the ultimate findings which will include the formal matters.

Mr. McHale: That is satisfactory.

Mr. Snell: That is satisfactory to the plaintiff.

The Court: The stipulation and exhibits thereto are received in evidence.

Mr. Snell: I forgot to say that I have only the exhibits for the original stipulation, whereas the rules call for a copy as well. We had some difficulty getting the necessary photostats, and we have tried to get clear ones, although we haven't succeeded in all cases in getting as clear ones as we would like to have them. But in the event there is any ambiguity as to the photostats, it is my understanding [15] that Mr. McHale will be willing to furnish the originals of all exhibits.

Mr. McHale: There are some pencil notations on some exhibits, made by Internal Revenue employees, and we are happy in that case to let the court know about that in case it should become a crucial issue at all; and we have the originals in our possession if the court wishes to look at them.

The Court: Mr. Clerk, is there any problem about sending the original file to Los Angeles?

The Clerk: No, sir.

The Court: What we are talking about here is that, under the rules of the court, documents are supposed to be filed in duplicate, and a master file remains in the court's possession in the district where the case is pending, and the judge has a working file which he might work up or use as he wants to.

But in this case there are apparently difficulties in having duplicates, so I will need to work with the originals. Can you send those to me?

The Clerk: Yes, sir, we can.

The Court: Then we will not need to have those files in duplicate.

Mr. Snell: Thank you. I do have one comment relative to the matter which Mr. Hale mentioned, the penciled [16] notations on some of the documents.

I would like to call, in particular, to the court's attention, a pencil notation on Exhibit 7-G. On the first page of the photostat exhibit there appears the statement, "To cover standard issues (deferment)," which was placed on there presumably by the defendant. It was not on the original when filed.

And in like manner there is a pencil interlineation on page 3 of the same exhibit, which reads, "and income taxes," which was not on the original when it was filed, and presumably placed on the original by the employees of the defendant in consideration of the claim.

There may be others. That one came to my attention this morning, and I feel it should be specifically called to the court's attention.

The Court: Well, if there are others, direct my attention to them in your memorandum or brief.

Mr. Snell: Yes, your Honor. I believe that we are prepared to submit the case.

The Court: It will be deemed submitted as of the time the closing brief is in. I say that for statistical reasons, too. The courts are supposed to keep current with their cases, and we begin to get needled by higher authority if we keep the case under submission longer than six months. And if

this is a case that is as complex as has been indicated, I [17] might need six months from the time the closing brief is in, because I am not going to start giving it intense attention until briefs are in, so I can see the entire thing at once. So the submission will be deemed as of the receipt of the closing brief.

The Clerk: Is this Exhibit No. 1?

The Court: Plaintiff's Exhibit No. 1.

Mr. Snell: If the court please, we had joint exhibits which were 1-A through 7-G. I wonder if we could give the stipulation an exhibit number of just "Stipulation of Facts"? That may be unique, but for clarification it might be the best thing to do.

The Court: All right. Is that agreeable, Mr. McHale?

Mr. McHale: Anything that is convenient to the court.

The Court: Mark it, Mr. Clerk, "Stipulation of Facts," and we will not give it an exhibit number. That means you both vouch for it.

Mr. Snell: It is so intended to be a joint stipulation.

The Court: The Stipulation of Facts and Exhibits 1-A through 7-G may be received in evidence.

(The documents referred to, marked as Stipulation of Facts and Joint Exhibits 1-A through 1-B, respectively, were received in evidence.)

The Court: Is there anything further?

Mr. McHale: Nothing further, your Honor. [18]

Mr. Snell: Nothing further, your Honor.

The Court: Thank you.

We will adjourn until tomorrow. [19]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 1st day of February, A.D. 1956.

/s/ DON P. CRAM,
Official Reporter.

Filed Sept. 14, 1956 (U.S.C.A.).

Docketed Oct. 1, 1956 (U.S.C.A.).

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby Certify that the foregoing pages numbered 1 to 227, inclusive, contain the original

Complaint;

Summons;

Stipulation & Order Extending Time to Plead, filed 7-1-52; 8-29-52; 10-1-52 and 11-3-52;

Answer;

Stipulation & Order to Vacate Hearing Under Rule 10(d);

Stipulation of Facts;

Appendixes to Plaintiff's Brief;

Plaintiff's Brief;

Defendant's Brief;

Plaintiff's Reply Brief;

Motion & Notice of Motion for New Trial;

Memorandum in Opposition to Motion for New Trial;

Order Overruling Plaintiff's Objections to introduction of Evidence;

Notice of Entry of Judgment;

Motion & Notice of Motion to Amend and Supplement Findings of Fact and Conclusions of Law together with Points & Authorities in Support thereof;

Supplemental Stipulation of Facts;

Bill of Costs;

Satisfaction of Judgment;

Findings of Fact and Conclusions of Law and Judgment;

Order Granting in Part and Denying in Part Plaintiff's Motion to Amend and Supplement Findings of Fact, Conclusions of Law;

Order denying motion for new trial;

Notice of Appeal;

Designation of Contents of Record on Appeal;

Letter dated March 23, 1956, from Court to Counsel.

which, together with a full, true and correct copy of; the Minutes of the Court for November 1, 1954, January 5, 1955, January 14, 1955, January 25, 1955, March 21, 1955, June 16, 1955, October 3, 1955, January 5, 1956, March 23, 1956, April 6, 1956, May 11, 1956; Notification of Court that "dismissal of the above action, under Rule 10(d) has been continued to January 5, 1955," etc.; a photostatic copy of Bond for Costs on Appeal; and "Joint Exhibits" 1-A to 7-G, inclusive; and 2 volumes of reporter's transcript of proceedings, all in the above-entitled cause, constitute the transcript of record on appeal in the above-entitled case to the Ninth Circuit Court of Appeals.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 11th day of September, 1956.

JOHN A. CHILDRESS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15310. United States Court of Appeals for the Ninth Circuit. Sunland Industries, Inc., a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed: September 14, 1956.

Docketed: October 1, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Case No. 15310

SUNLAND INDUSTRIES, INC., a Corporation,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS

To Paul P. O'Brien, Clerk of the United States
Court of Appeals:

Please Take Notice that pursuant to Rule 17 (6)
of the Rules of Practice of the United States Court
of Appeals for the Ninth Circuit, Appellant in the
above-entitled matter herewith presents the points
upon which it claims the Court erred:

Point I.

In finding that the Commissioner of Internal
Revenue waived the regulatory requirement of fil-
ing a Form 991 with the return and allowed tax-
payer the deferment for 1943. In failing to find
that such waiver could only be made at the time of
filing of the return and that there was no evidence
in the record establishing any action by the Com-
missioner at such time.

Point II.

In finding that the reference to the 1942 claim together with the taxpayer's own course of conduct served to mislead the Commissioner. In failing to find Commissioner at all times knew or should have known all the facts needed to make a timely assessment of the taxpayer's 1943 tax liability. In failing to find that there was no evidence in the record establishing that the Commissioner in any way relied on the 1942 claim.

Point III.

In failing to find that the Plaintiff did not claim a reduction in taxes under Section 722 of the 1939 Revenue Code on its 1943 return and that Plaintiff did not show any amount as being such a reduction in taxes on said return. In failing to find that no application for relief under Section 722 was filed with said return and that no information in support of relief under Section 722 was shown on said return.

Point IV.

In failing to find that the Plaintiff did not comply with Regulation 112, Section 35.710-5 [formerly in 26 C.F.R.] as to the taxable year 1943. In failing to find that no application for relief on Form 991 was filed with the 1943 return, and that no information in support of a deferment under Section 710 (a) (5) of the 1939 Revenue Code was shown on said return.

Point V.

In failing to find that the sum of \$78,130.71 constitutes the amount of tax and interest paid by the Plaintiff on December 14, 1949; that the general period of Limitation set forth in Section 275 of the 1939 Revenue Code applied to said amount; that such period of limitation expired on June 30, 1949; that said amount constituted a payment after the expiration of the period of limitation properly applicable thereto; and that Plaintiff is entitled to the refund of said amount.

Point VI.

In holding that the Commissioner had power or discretion to waive the requirements of Treasury Regulations compelling the taxpayer to file its return on an application for relief on Form 991. In failing to hold that the amount constituting a deferment under Section 710 (a) (5) is fixed and determined at the time the return is filed and that the Commissioner has no power or discretion to extend this time. In failing to hold that Treasury Regulations are equally binding on the Commissioner and taxpayer alike.

Point VII.

In holding that the Plaintiff's reference to the claim on file and the Plaintiff's course of conduct is a defense to its refund claim. In failing to hold that the Commissioner is charged to bring any improper returns to light before the period of

limitations expires. In failing to hold that a non-fraudulent mistake cannot deprive a taxpayer of the protection of the Statute of Limitations.

Point VIII.

In holding that the amount of Plaintiff's tax liability constituting a deferment under Section 710 (a) (5) could not be determined until its application for relief under Section 722 was considered in the regular fashion. In failing to hold that such amount is based solely on the amount of reduction in tax claimed at the time of filing of the return; that such amount is fixed and determined at the time of the filing of the return; and that the subsequent processing of the application for relief under Section 722 in no way affects the amount of deferment.

Point IX.

In holding that the Plaintiff put the Special Statute of Limitations under Section 710 (a) (5) into effect by invoking the relief provisions contained in the World War II Excess Profits Tax Law. In failing to hold that relief provisions under Section 722 can be invoked by filing application for relief at any time within three (3) years from the filing of the return; that deferment provisions in Section 710 (a) (5) can be invoked only by filing an application for relief at the time of the filing of the return; that the Plaintiff invoked the relief provisions under Section 722 by filing an application for relief two (2) years after the filing of

return; and that the Plaintiff did not thereby put the provisions of Section 710 (a) (5) into effect.

Point X.

In failing to hold that the provisions of Section 710 (a) (5) are invoked only where a taxpayer claims a reduction in taxes under Section 722 on its return; that the Plaintiff did not claim a reduction in taxes on its 1943 return; and that no amount of the Plaintiff's 1943 tax liability could constitute an amount deferred under Section 710 (a) (5).

Point XI.

In failing to hold that the provisions of Section 710 (a) (5) are invoked only where a taxpayer complies with Regulation 112, Section 35.710-5; that Plaintiff did not comply with said Regulation as to the taxable year 1943; and that no amount of the Plaintiff's 1943 tax liability could constitute an amount deferred under Section 710 (a) (5).

Point XII.

In failing to hold that the general period of limitations set forth in Section 275 of the 1939 Revenue Code properly applied to the \$78,130.71, payment of tax and interest made on December 14, 1949, and that such payment was a payment after the expiration of the period of limitation properly applicable thereto.

Point XIII.

In failing to hold that the Plaintiff is entitled to judgment for the sum of \$78,130.71, together with

interest at the rate of six per cent (6%) per annum [as provided in 28 U.S.C. 2411] from said date of payment until a date preceding the refund check by not more than thirty (30) days.

Point XIV, Which Is Claimed in the Alternative, and Only in the Event It Is Otherwise Determined That the Period of Limitations in Section 710 (a) (5) Applies.

In failing to find and hold that the Period of Limitation in Section 710 (a) (5) applies only to thirty-three per cent (33%) of whatever is determined to be the reduction in taxes under Section 722 shown on the return; that in any event it applies to no more than:

(a) 33% of the sum \$38,768.03, being the reduction in tax which would result from applying the 1942 claim for relief figures to the taxable year 1943.

(b) 33% of the sum \$45,494.32, being the amount of reduction claimed for the calendar year 1943 in the application for relief filed March 12, 1946.

(c) 33% of the sum \$63,768.68, being the figure set forth opposite the caption on line 17 of the 1943 return.

In failing to find that the General Period of Limitations in Section 275 applies to the balance of the \$78,130.71, payment of tax and interest paid on December 14, 1949, and that the Plaintiff is entitled

to judgment for said balance together with interest as provided in 28 U.S.C. 2411.

Point XV.

In denying Plaintiff's motion for a new trial, which said motion was based on the grounds that the Court decided the case before the Plaintiff submitted its Reply Brief, the Court having previously ordered that the cause be submitted on briefs, including Reply Brief.

Point XVI.

In overruling Plaintiff's objection to the introduction of a portion of Defendant's evidence, to wit, those facts found in paragraph VII of the Stipulation of Facts; which said objection was based on the grounds that said portion of the evidence related only to affirmative defenses which were not pleaded.

Dated this 28th day of September, 1956, at Fresno, California.

/s/ WILLIAM N. SNELL,
Attorney for Appellant.

[Endorsed]: Filed October 1, 1956.



**In the United States
Circuit Court of Appeals
For the Ninth Circuit**

COUNTY OF SAN DIEGO and THE CITY
OF SAN DIEGO,

v.

Appellants,

UNITED STATES OF AMERICA,

Appellee.

CHARLES W. CARLSTROM, SOUTHERN
CALIFORNIA CHILDREN'S AID FOUNDA-
TION, INC., a corporation, SOUTHERN
CALIFORNIA DISTRICT COUNCIL OF THE
ASSEMBLIES OF GOD, INC., a corpora-
tion, and THE SALVATION ARMY,

v.

Appellants,

COUNTY OF SAN DIEGO,

Appellee.

**BRIEF FOR APPELLANTS COUNTY OF
SAN DIEGO AND THE CITY OF
SAN DIEGO ON APPEAL**

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FILED

MAY 22 1957

PAUL P. O'BRIEN, CLERK

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In the United States
Circuit Court of Appeals
For the Ninth Circuit
NO. 15352

COUNTY OF SAN DIEGO and THE CITY
OF SAN DIEGO,

v.

Appellants,

UNITED STATES OF AMERICA,

Appellee.

CHARLES W. CARLSTROM, SOUTHERN
CALIFORNIA CHILDREN'S AID FOUNDA-
TION, INC., a corporation, SOUTHERN
CALIFORNIA DISTRICT COUNCIL OF THE
ASSEMBLIES OF GOD, INC., a corpora-
tion, and THE SALVATION ARMY,

v.

Appellants,

COUNTY OF SAN DIEGO,

Appellee.

**BRIEF FOR APPELLANTS COUNTY OF
SAN DIEGO AND THE CITY OF
SAN DIEGO ON APPEAL**

STATEMENT OF POINTS ON APPEAL

The Statement of Points on Appeal has heretofore been set forth at page 85 of the Transcript of Record, as follows:

"1. The trial court erred in denying taxing agencies any recovery in an action where the taxes became a lien as of the first Monday in March, 1955, the United States took title June 16,

1955 and where there has not at this date been a payment out of the deposit in court.

"2. The trial court erred in construing California Revenue and Taxation Code Section 4986 as giving the United States the right to compel a cancellation not only of taxes of record against real property but also to defeat the right of taxing [201] agencies to payment of their tax demands out of deposits in court in a condemnation proceeding.

"3. The trial court erred in holding that the United States has a sufficient or any interest in the deposit in court in a condemnation award to enable it to intervene in a dispute between the defendants as to ownership or beneficial rights in such fund."

STATEMENT OF FACTS

The action involves taxes on real property assessed by and payable to the County of San Diego and The City of San Diego for the fiscal year 1955-56. The taxes became a lien on the first Monday of March, 1955, which was March 7. The United States of America took title to the property in question on June 16, 1955 by filing its declaration of taking. On November 4, 1955 the United States of America made application to the Board of Supervisors of the County of San Diego for cancellation of said taxes, which application was by the Board of Supervisors denied on January 10, 1956. The Answer filed by appellants City and County claim as the amount of the taxes, exclusive of any penalties, interest or costs, the aggregate amount of \$333,164.34 assessed to the various parcels and summarized in the Supplemental Answer, which is set forth at pages 16 and 17 of the Transcript of Record. The former owners against whom the taxes were

assessed also filed a motion to strike the answer of The City and County. The trial court, by its Judgment (Tr., pp. 65 through 82), granted summary judgment to the United States cancelling the 1955-56 general taxes and enjoining their collection (Tr., p. 79) and denying the motion of the owners to strike the supplemental answer (Tr., p. 80). The County and The City have appealed from the summary judgment cancelling the taxes and the former property owners have appealed from the judgment denying their Motion to Strike.

STATUTES INVOLVED

Constitution of California, Article IV, § 31:

“The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; . . .”

Constitution of the United States, Amendment 5:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public

danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

U. S. Code, Title 40, § 258a:

“The court shall have power to make such orders in respect of . . . liens . . . taxes . . . and other charges . . . as shall be just and equitable.”

California Revenue and Taxation Code, § 4986:

“All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be canceled by the auditor on order of the board of supervisors with the written consent of the district attorney if it was levied or charged:

(a) More than once.

(b) Erroneously or illegally.

(c) On a portion of an assessment in excess of the cash value of the property by reason of the assessor’s clerical error.

(d) On improvements when the improvements did not exist on the lien date.

(e) On property acquired after the lien date by the State or by any county, city, school district or other political subdivision and because of this public ownership not subject to sale for delinquent taxes, and on property annexed after the lien date by the city owning it.

(f) On property acquired after the lien date by the United

States of America if such property upon such acquisition becomes exempt from taxation under the laws of the United States.

(g) On personal property or improvements assessed as a lien against real property acquired after the lien date by the United States of America, the State or by any county, city, school district or other political subdivision which because of this public ownership is not subject to sale for delinquent taxes.

“ ‘Property acquired’ as used in this section shall include street easements and shall also include other easements for public use where the residual estate remaining in private ownership has a nominal value only.

“No cancellation under subparagraphs (b), (e), (f), or (g) of this section shall be made in respect of all or any portion of any tax, or penalties or costs attached thereto, collectible by county officers on behalf of a municipal corporation without the written consent of the city attorney thereof.

“No cancellation under subparagraph (g) shall be made in respect of all or any portion of any tax, or penalties or costs attached thereto, until after three years succeeding the lien date of such tax on personal property or improvements and then only if in the opinion of the county auditor and the board of supervisors the remaining real property under the assessment is not of sufficient value to secure payment of the taxes on such personal property or improvements.”

California Revenue and Taxation Code, § 4986.2:

“All or any portion of uncollected city taxes, penalties or costs may be canceled on any of the grounds specified in Section 4986. If the city taxes are collected by the county, the procedure

outlined in Section 4986 for the cancellation of taxes, penalties or costs shall be followed, except that the consent of the city attorney, in lieu of the consent of the district attorney, is necessary before cancellation. If the taxes are collected by the city, the taxes, penalties, or costs shall be cancelled by the officer having custody of the records thereof on order of the governing body of the city, with the written consent of the city attorney."

California Revenue and Taxation Code, § 2192:

"All tax liens attach annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied."

California Revenue and Taxation Code, § 16:

" 'Shall' is mandatory and 'may' is permissive."

California Revenue and Taxation Code, § 3003:

"Where delinquent taxes or assessments are not a lien on real property sufficient, in the judgment of the assessor or the board of supervisors, to secure the payment of the taxes or assessments, the county may sue in its own name for the recovery of the delinquent taxes or assessments, with penalties and costs."

California Code of Civil Procedure, § 1252.1:

"At the time of commencement of the trial of any condemnation action in which a public agency exempt from taxes is the plaintiff, the clerk of the court shall serve upon the officer or officers responsible for the computation of all ad valorem taxes on the property being condemned, written notice to prepare and file with the clerk of the court a certificate of all delinquent taxes,

penalties and costs, and of all current taxes, due and payable on said property as of the date said notice was served. There shall be filed by the clerk with the court, as part of the records in said action, a copy of said written notice with the acknowledgment of service and the date thereof endorsed thereon by the officer so served. For the purposes of this section, the term taxes shall include ad valorem special assessments levied and collected in the same manner as other taxes. In the event said notices are served at a time when the amount of the current taxes, which are a lien on the property but not yet payable, are not known to the certifying officers, said certificates shall contain, in lieu of a statement of the current taxes, a statement based on (1) the assessed value for the current year of the property being condemned, and (2) the tax rate for the previous fiscal year. Said certificates shall be filed with the clerk of the court, as a part of the records and files of said condemnation action, within 10 days after the service of said notices, and in the event of failure on the part of any officer upon whom such notice is served to file said certificates within said time, it shall be conclusively presumed that as to the taxes for the collection of which such officer is responsible, no taxes are due and payable on said property, or in any manner constitute a lien thereon.

“Before making any final order of condemnation in such action, the court shall determine whether said certificates have been filed by all officers upon whom the notices have been served. If said certificates have been filed, the court shall as a part of the judgment direct the payment to the tax collecting agencies, out of the award, the amounts of the delinquent taxes, penalties and costs, and the amounts of the current taxes, shown by said certificates to be due and payable. In the event said certificates show that the amounts of current taxes which are a lien are not known,

and in lieu of the statement of current taxes contain a statement based on the assessed value for the current year and the tax rate for the previous year, the court shall in lieu of directing the payment of current taxes order the payment of sums bearing the same relation to the amounts shown in said statements as the portion of the current fiscal year from the commencement thereof to the date of the final order of condemnation bears towards an entire fiscal year; provided, that in the event an order permitting the plaintiff to take immediate possession was entered in such action, prior to the payment of any taxes for the fiscal year during which said order was entered, the court shall, for such fiscal year, order the payment of a sum bearing the same relation to the amount of the taxes for such fiscal year, or in the event said amount is not known, to the amount shown in said statement based on the assessed value for the current year and the tax rate for the previous year, as the portion of such fiscal year from the commencement thereof to the date of entry of such order of immediate possession bears towards an entire fiscal year.

“In any such action, the payment of the sums ordered by the court to be paid shall be considered to be in lieu of all taxes, current and delinquent, and all penalties and costs, due and payable with respect to the property being condemned, and said judgment shall, in addition to ordering said payments, order the cancellation, as of the date of the judgment, of all taxes, current and delinquent, and all penalties and costs, on said property. Said judgment shall be conclusively binding on all tax collecting agencies upon which the notices were duly served by the clerk of the court.

“The subject of the amount of the taxes which may be due on any property shall not be considered relevant on any issue in

such condemnation action, and the mention of said subject, either in the voir dire examination of jurors, or during the examination of witnesses, or as a part of the court's instructions to the jury, or in argument of counsel, or otherwise, shall constitute grounds for a mistrial in any such action. [Added by Stats. 1953, ch. 1792, § 1.]” [Repealed by Stats. 1955, ch. 1229, § 1, effective September 1, 1955.]

BRIEF

Taxes Payable from Condemnation Deposit

1. The County of San Diego and The City of San Diego take the position that their tax obligations which became a lien as of March 7, 1955 are entitled to be paid out of the funds deposited by the Government in court where the United States became the owner on June 16, 1955. The Government bases its right to cancellation on the provisions of Section 4986 of the Revenue and Taxation Code of the State of California. But for its alleged privilege as a governmental agency to compel local governments to cancel valid tax liens against their will, or in the absence of the exercise of such privilege, it seems clear that the taxes are a valid obligation and must be paid out of the award. *U. S. v. Alabama*, 313 U. S. 274; *U. S. v. Certain Parcels*, 44 F. Supp. 936; *Collector v. Ford Motor Co.*, 158 F. 2d 354.

Many cases on this point are collected in the annotation at 45 ALR 2d 522. See also:

U. S. v. Certain Parcels, 130 F. 2d 782

Coggeshall v. U. S., 95 F. 2d 986

U. S. v. Certain Lands, 49 F. Supp. 225

Cobo v. U. S., 94 F. 2d 351

Richard T. Green Co. v. Chelsea, 149 F. 2d 927

City of Santa Monica v. Los Angeles County, 15 Cal. App.
710

Estate of Backesto, 63 Cal. App. 265

Reeve v. Kennedy, 43 Cal. 643

Cancellation Not Applicable to Condemnation Proceeds.

2. The Government and the trial judge relied with respect to the right of cancellation upon the provisions of the California Revenue and Taxation Code, Section 4986, and the California cases holding that such right of a governmental agency to cancel is mandatory.

Despite the fact that the statute says that the taxes *may* be canceled by the auditor on order of the board of supervisors, the earlier cases have held that such a right, when claimed by one local governmental agency in California against another, is mandatory and not discretionary. The cases so holding include *City of Los Angeles v. Board of Supervisors*, 108 Cal. App. 655 and *City of Los Angeles v. Ford*, 12 Cal. 2d 407. These cases, however, have been greatly weakened and in all probability superseded by:

Sherman v. Quinn, 31 Cal. 2d 661

Vista Irrigation District v. Board of Supervisors, 32 Cal. 2d
477

Security First National Bank v. Board of Supervisors of Los Angeles, 35 Cal. 2d 323.

The last three cases hold that mandamus is not a proper remedy to compel cancellation of a tax. Instead the sole remedy of the person seeking relief, which in the case of the Vista Irriga-

tion District was a governmental public agency, is to pay the tax under protest and sue for its recovery. To the extent of inconsistency with the more recent decisions of the California Supreme Court, the cases relied on by the Government are necessarily overruled. It now appears that the right of cancellation no longer exists. Appellants also direct the following arguments against the contentions of the United States:

a. The cases cited by the Government dealt with the statute when it was a part of the Political Code as Section 3804a. The reenactment of the same statute as Section 4986 of the Revenue and Taxation Code must be read in the context of Section 16 of the same Code providing that "shall" is mandatory and "may" permissive. There was no comparable aid to interpretation in the former Political Code.

b. The California court in its decisions was dealing with agencies which had no power to acquire title in a condemnation action prior to judgment. A public agency, whether Federal, State or local, may purchase land in the open market; having done so, the State of California makes a contribution or a gift to such public agency of some or all of its tax funds and tax funds of local agencies by permitting or requiring the cancellation of past due taxes or any taxes which became a lien prior to acquisition of title by the taxing agency, thus assisting all public agencies to acquire real property more expeditiously and economically. If, however, the public agency proceeds in the California courts it must recognize and pay the liens, claims and demands of taxing agencies as well as other encumbrances, since it is dealing adversely with the condemnees and cancellation of taxes would benefit only the condemnee and not the condemnor. Land valuation is then established not by negotiation and agreement but in an adversary trial.

There is no provision under the California law whereby a condemnor in eminent domain may acquire title prior to the final judgment which determines just compensation and apportions it among the parties entitled thereto. Title 40, U. S. Code, § 258a, in providing for the taking of title in advance of final judgment, has no counterpart in the State law. Therefore a condemnor, as contrasted with a purchaser, cannot obtain cancellation of outstanding taxes. Thus, if a California city buys land on the open market, it may petition the board of supervisors to cancel outstanding taxes. If, however, the city cannot reach an agreement with the former owner, the County is entitled to payment of its tax obligations out of the condemnation award. *Weston Investment Co. v. State of California*, 31 Cal. 2d 390; *City of Los Angeles v. Superior Court*, 2 Cal. 2d 138; *Marin Municipal Water District v. North Coast Water Company*, 40 Cal. App. 260. The lien of taxes is held to be transferred from the land to the award on deposit with the court. *Wilson v. Beville*, 47 AC 857 at 860, citing and following *Thibodo v. U. S.*, 187 F. 2d 249. See also *Dawson County v. Hagen*, 177 F. 2d 186; *U. S. v. 111,000 Acres*, 155 F. 2d 683; *U. S. v. 412.715 Acres*, 60 F. Supp. 576.

Although the California Attorney General has not maintained a fully consistent position in the matter, he implies in his opinion No. 5035, printed in Vol. 2, p. 103 of Opinions of the Attorney General of California, that the right of cancellation under Section 4986 as to the United States is not applicable where the United States has deposited the purchase price in the registry of the court. Because of the importance of that opinion it is attached hereto as Exhibit A (See Appendix). Later opinions of the California Attorney General are not inconsistent in result. 2 *Ops. Cal. Atty. Gen.* 526 dealt with the State Veterans Welfare Board. 4 *Ops. Cal. Atty. Gen.* 308 dealt with a public utility district organized under State laws. 6 *Ops. Cal. Atty. Gen.* 72 dealt

with cancellation of tax liens on property acquired by a school district. In none of the three latter opinions was there involved a deposit of money in the registry of a court; instead, title and ownership in the public agency was acquired by purchase. Appellants also urge that all of the opinions of the Attorney General here involved were prior to, and consequently could not evaluate the effect of, *Sherman v. Quinn*, *supra*, and *Vista Irrigation District v. Board of Supervisors*, *supra*.

Of the authorities cited and relied upon by the California Attorney General in the opinion attached hereto as an Appendix, the following have the most compelling effect:

California Constitution, Article IV, § 31

Estate of Stanford, 126 Cal. 112

Trippett v. State, 149 Cal. 521

Estate of Potter, 188 Cal. 55

The California Constitution prohibits the gift by the State or any subdivision of anything of value for a private purpose. The cancellation of taxes on property acquired by a public body for public purposes does not offend the section. Such public bodies can exercise the privilege for public benefit in that they are thereby enabled to acquire property more cheaply and readily by purchase. If, however, valuation is contested in court, the cancellation is solely for the private benefit of the former owners and the attempted construction by the District Court of Section 4986(f) of the Revenue and Taxation Code is in violation of Section 31 of Article IV of the California Constitution.

c. In this connection, these appellants urge that possibly the United States may have or should be recognized to have a right with respect to the real property which it has acquired, as distinct from any right to control or interfere with disposition of

the deposit. The authorities holding that the passing of title effects a transfer of the lien from the land to the deposit would indicate that the United States has become the absolute owner of the real property, that no liens remain effective against the land itself. This, however, does not justify the district court in denying appellants their right to receive the amount of taxes which are justly and properly payable to them out of the condemnation award.

d. It remains an open question in California specifically not determined by the California Supreme Court, whether a cause of action for the taxes remains against the former owner personally after the land which is the subject of the taxes has become exempt. *Weston Investment Co. v. State of California*, 31 Cal. 2d 390 at 392. As pointed out in that opinion, the right to sue is conferred by Revenue and Taxation Code § 3003. The statute which formerly forbade such action as to taxes secured by real property, § 3001, was repealed in 1943. Appellants therefore urge that the trial court acted in excess of its jurisdiction and without any authority in prohibiting collection of the tax obligation from the landowners by personal action. It was therefore erroneous for the trial court here to give judgment (Tr. p. 79, 82) precluding further action against the taxpayers personally. The remedy of the Government should be limited to a declaration that the lien has been transferred from the land to the deposit.

United States Not Interested in Distribution of Deposit.

3. The Federal courts have many times recognized and approved the policy of the United States not to participate in disputes between claimants to a condemnation award. Instead, it has often been said that the government maintains a neutral

position and has no interest in the manner of distributing the award.

U. S. v. Dunnington, 146 U. S. 338

U. S. v. 111,000 Acres, 155 F. 2d 683

Cobo v. United States, 94 F. 2d 351

U. S. v. 412.715 Acres, 60 F. Supp. 576

U. S. v. 232.68 Acres, 57 F. Supp. 891

U. S. v. Certain Lands in Eau Claire, 49 F. Supp. 225

U. S. v. 19,553.59 Acres in Cheyenne County, 70 F. Supp. 610, affirmed 154 F. 2d 866

City of St. Paul v. Certain Lands, 48 F. 2d 805

U. S. v. Certain Lands, 129 F. 2d 918

U. S. v. Adamant Co., 197 F. 2d 1.

The Government is further unsound and inaccurate in assuming that the taxes are imposed for a fiscal year. The law of California is well settled that the lien of a real property tax attaches as an indivisible whole at the instant of 12 o'clock noon of the first Monday in March. The taxpayer is not relieved of any duty of payment by the loss or destruction of the property taxed immediately after the lien date. Cases clearly demonstrating the force of this view are accepted and recognized in *United States v. Certain Parcels*, 44 F. Supp. 936, where the court cites and relies on *City of Los Angeles v. Superior Court*, 2 Cal. 2d 138, and *Marin Municipal Water District v. North Coast Water Company*, 40 Cal. App. 260, and particular reliance was placed on *United States v. Alabama*, 313 U. S. 274.

With further reference to the supposed duty of the Government to intervene to the injury of local taxing bodies, particular attention is called to the case of *City of Pasadena v. Chamberlain*, 1 Cal. App. 2d 125 at 133, where the court said:

"With reference to the city and county taxes past due on the property, it is urged that under Political Code, Section 3804a, such taxes would be discharged and canceled upon application to the body imposing them. (*City of Los Angeles v. Board of Supervisors*, 108 Cal. App. 655 [292 Pac. 539].) They are not so canceled nor otherwise affected until and unless the body seeking relief from such taxes has complied with the provisions of the section just cited and has made application for such cancellation. (*People v. Board of Supervisors*, 126 Cal. App. 670 [15 Pac. (2d) 209].) Petitioner has not sought cancellation nor reduction of the past due taxes here in question, but has proposed by the bonds here assailed to provide funds to pay them. Our attention has not been directed to any authority which would construe the provisions of Political Code, Section 3804a, permitting such an application for relief from taxes, as requiring the body entitled thereto to make such a request. Such unpaid taxes do not dissolve by merger in the greater estate upon acquisition of tax title by the city. (*City of Santa Monica v. Los Angeles County*, 15 Cal. App. 710 [115 Pac. 945].) The interest of the city and county in the land by reason of unpaid taxes continues unimpaired and undiminished unless the taxes are paid or canceled."

See also *San Gabriel Land and Water Co. v. Witmer Bros. Co.*, 96 Cal. 623; *County of San Diego v. County of Riverside*, 125 Cal. 495; and the Opinion of the Attorney General appended hereto.

Due Process of Law.

4. Appellants further suggest that the effort made by the Government to interfere with the vested rights of the County and The City is an attempted infringement of the provisions of the 5th Amendment to the United States Constitution and would amount to the taking of property of local political bodies without just compensation. This position has support in *U. S. v. Wheeler Township*, 66 F. 2d 977 at 987 and cases there cited, notably

Monongahela Navigation Co. v. U. S., 148 U. S. 312.

The trial court has therefore permitted the Government to intervene for the sole benefit and profit of private litigants, who could not obtain a cancellation of taxes in their own behalf. The Government, as previously urged, should be granted only a declaration that it holds the land free and clear of the tax lien, but permitting recovery by the appellants from the deposit in court.

Cross-Appeal of Owners of Property.

5. With respect to the appeal of the former owners from the denial of their Motion to Strike, it is submitted that the district judge was manifestly right in holding that such defendants are not entitled to relief under the provisions of Section 1252.1 of the California Code of Civil Procedure. It would appear more appropriate for these appellants to reserve argument on the point until the briefs of the cross-appellants are filed, except to call attention to the trial court's opinion, found at Transcript of Record, pages 63 through 65. These appellants will urge that the statute is to a large extent unintelligible and unworkable and for that reason has been repealed; that it violates California Constitution, Article IV, Section 31; that in any event its operation was primarily procedural rather than substantive, and therefore that the repeal of the statute precludes its application in favor of cross-appellants.

CONCLUSION

It is therefore respectfully submitted that the Judgment should be reversed with directions to recognize the tax obligations of the appellants County of San Diego and The City of San Diego for the fiscal year 1955-56 as justly enforceable obligations and as such payable from the deposit in the registry of the court.

Respectfully submitted,

JAMES DON KELLER, District Attorney

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San Diego*

JEAN F. DUPAUL, City Attorney

By ALAN M. FIRESTONE, Deputy
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APPENDIX

EXHIBIT A

Opinion NS-5035—August 9, 1943

SUBJECT: TAXATION, DISCUSSION OF DUTIES OF COUNTY ASSESSOR AND RIGHTS OF COUNTY TO ITS TAXES WHERE THE UNITED STATES ACQUIRES TITLE TO PROPERTY IN A CONDEMNATION PROCEEDING.

Attorney General's Opinions

PREPARED FOR: DISTRICT ATTORNEY OF SOLANO COUNTY, FAIRFIELD.

PREPARED BY: H. H. LINNEY, ASSISTANT ATTORNEY GENERAL.

In your letter of May 26 you ask whether I concur in advice given by you to certain county officials concerning questions relating to the lien of taxes on property acquired by the United States through condemnation proceedings. You state that the United States, after acquiring the property, is entitled to have the taxes and liens cancelled, but that the Government has adopted the policy of "requiring all taxes which are a lien on such properties to be paid by the owner or else deducted from the moneys due for damages, as fixed by the judgment of condemnation."

You state that you have advised as follows:

1. The liability of property owners for taxes is fixed as of the date when title vests in the United States.

2. The county is entitled to taxes, interest and penalties, to the date when title vests in the United States, but not thereafter.

3. Title vests in the United States:

(a) On the date of the taking when the defendant stipulates in writing waiving any defense to the government's action and agreeing to the compensation.

(b) Otherwise title vests on the date of the judgment of condemnation.

4. That a provision of the judgment that title shall vest, *nunc pro tunc*, as of the date of the previous order of taking, does not affect the right of the county to taxes which are a lien and due and payable on the date of entry of the judgment.

5. Based upon the foregoing you have advised the assessor to enter on his roll all property in private ownership on the first Monday in March, regardless of any order of taking then made, except as set forth above, presumably in 3(a).

6. If, on the first Monday in March, the assessor has actual notice of a judgment of condemnation rendered and entered prior to that date by a Federal Court, you advise that the property be left off the roll, even though the judgment has not been recorded in the office of the county recorder.

7. If after the first Monday in March and before the first day of the following November title vests in the United States, you advise that the property be entered on the roll, even though action be pending and an order of taking be made prior to the first Monday in March.

However, you state that in such circumstances your opinion is that the taxes cannot be collected, citing *United States v. 441549 Square Feet*, 41 Fed. Supp. 523.

I do not believe it is necessary to discuss in detail all of the foregoing points upon which your views have been expressed. Rather, I think, it would be more appropriate to discuss generally

the duties of the county assessor and the rights of the county to its taxes under the particular circumstances above set forth.

1. The right of the United States to petition for the cancellation of taxes on property acquired by it after the lien date is set forth in Section 4986 of the Revenue and Taxation Code. Whether, in view of Sections 2 and 16 of the code, the cancellation is mandatory is perhaps an open question.

2. In view of the government's policy of requiring payment of taxes which are a lien on property condemned it is necessary to ascertain the amount of such taxes so that the same may be paid by the owner or deducted from the condemnation award.

3. Section 258(a), 40 U. S. C. A., provides in part that:

"The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable."

Section 258 provides that the condemnation procedure shall conform as near as may be to the State procedure in like causes.

Therefore, Section 14 of Article I of the State Constitution and Sections 1231 to 1266.1 of the Code of Civil Procedure, relating to eminent domain, become of some importance in this connection, especially in regard to procedure.

Section 1253 of the Code of Civil Procedure provides for a final order of adjudication and also provides that a copy of the order "must be filed in the office of the recorder of the county, *and thereupon* the property described therein *shall vest in the plaintiff* for the purposes therein specified" (emphasis supplied).

The provisions of the State Constitution and statutes are controlling except to the extent that they are modified by the Federal

statute (*United States v. Certain Parcels of Land*, 41 Fed. (2d) 436, at 441).

As I read Section 259(a) the filing of the "declaration" followed by the usual ex parte judgment vesting title in the United States has the effect of vesting title at that time rather than at the time the final judgment of condemnation is filed. If this is correct, then the basic date for determining tax liens is the former and not the latter date, and some modification would be required of the views expressed in the last two paragraphs of your letter preceding paragraph (4) on page 2.

4. This leaves for consideration the question of the amount to be paid as taxes when the "taking" occurs after the first Monday in March in any calendar year. By the term "taking" I refer to the filing of the declaration *and* the entry of the ex parte judgment.

There are cases which hold that where the United States acquires title to real property *after* the lien date but *before* the rate is fixed and the tax is actually levied and assessed, the tax never becomes a lien and cancellation is proper.

Territory v. Perrin, 9 Ariz. 316, 83 Pac. 261

Gilmore v. Dale, 75 P. (Utah) 932

City and County of Denver v. Tax Research Bureau, 71 P. (2d) (Colo.) 809, 811, and cases cited therein

United States v. Certain Lands, 29 F. Supp. 92.

In California the tax lien attaches on the first Monday in March and apparently the law is that the tax is collectible even though before it is actually levied (by extending it on the roll) the property is destroyed. This rule no doubt prompted the adoption in 1933 of Section 8(a) of Article XIII of the Constitution, to take care of a situation resulting from an earthquake in Southern

California on March 10 of that year.

Since the lien which attaches on the first Monday in March is to secure taxes to be levied in and for the ensuing fiscal year (July 1-June 30), it is arguable that property existing on the first Monday in March but nonexistent on the following July 1, should not be taxed. Likewise, it is arguable that any property the title to which is vested in the State or the United States prior to July 1, should not be assessable for taxes for the ensuing fiscal year. It is clear that such taxes, if assessed on property acquired by the State or the United States, cannot be collected by sale. Probably in recognition of this fact Section 3804(a) of the Political Code (Section 4986, Revenue and Taxation Code) was adopted, permitting cancellation of such taxes.

The laws in this State, however, appear to be that if property has a taxable status on the first Monday in March, it is taxable for the succeeding fiscal year regardless of a change in status, such as total destruction, or acquisition by the United States or the State, after that date.

In *San Gabriel Valley Land & Water Co. v. Witmer Bros. Co.* (1892) 96 Cal. 623, at 626, the court said, "The taxes for each fiscal year accrue on the first Monday of March preceding (Const. Art. XIII, Sec. 5), and when assessed, take effect and become a lien from that date (Political Code, Section 3718) * * *."

In *County of San Diego v. County of Riverside*, (1899) 125 Cal. 495, at 500, the court said:

"The lien for the taxes justly leviable upon the property of a railroad company attaches on the first Monday of March in each year, and the obligation to pay necessarily accrues at the same time, if not earlier. Payment is not due, of course, until the assessment has been made; but, when that has been done and the amount of the taxes ascertained, it is payable to the county in which the roadbed was included at the time when the lien attached."

In *Rode v. Siebe*, (1898) 119 C. 518, it was said (page 520):

"It is sufficient to say that under the constitution and laws of California the fiscal year begins on the 1st of July and ends on the 30th of June. The taxes for each fiscal year accrue on the first Monday in March preceding its commencement, and become a lien from that date upon the real property of the respective taxpayers."

In *Grant v. Cornell*, (1905) 147 Cal. 565, at 567, it was said:

"The lien of the tax exists by statute, and can be discharged only by payment (Pol. Code Secs. 3716, 3717), and all persons are required to take notice of that fact."

In *State v. Royal Cons. Min. Co.*, (1921), 187 C. 343, at 346, the court said:

"Under our system of taxation the lien therefor attaches on the first Monday in March of each year. 'Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof.' (Pol. Code, Sec. 3716.) Taxes upon personal property and upon the improvements upon real property are also liens upon the real property. (Pol. Code, Secs. 3717 and 3719.) The lien attaches and remains upon the real estate until payment or sale, notwithstanding defects in the assessment, and if the sale is for any reason void, it, of course, does not discharge the lien."

At this point we refer to Section 3820 of the Political Code (Section 2901 R. & T. Code).

Under that section, as well as under Section 2901 of the Revenue and Taxation Code taxes on property not secured by real estate are due on the lien date. That is to say, such taxes are due on the first Monday in March and may be collected by the assessor

as soon as the assessments have been made (R. & T. Code, Sec. 2914).

Section 3820 was construed in the case of *Bakersfield & Fresno Oil Co. v. Kern County*, (1904) 144 Cal. 148, and held to be constitutional. This decision was followed in *Mohawk Oil Co. v. Hopkins*, (1925), 196 Cal. 148. The significance of these decisions is that the taxes were collectible even prior to the start of the fiscal year for which they were to be collected. If that was true as to taxes on possessory interests or on personal property which were not secured by real estate, it seems to follow that as to real property taxes the same *liability for payment* would arise on the first Monday in March, notwithstanding the fact that the payment of such taxes was postponed until after the start of the fiscal year.

The latest expression of our Supreme Court on this subject is in its decision in the case of *Weber v. County of Santa Barbara*, (1940), 15 C. (2d) 82, and in the companion case of *Dawson v. County of Los Angeles*, 15 C. (2d) 77.

The facts in the Weber case were substantially these:

On the first Monday in March of 1935 the plaintiff owned certain stocks and bonds then taxable under Section 3627a of the Political Code and taxes were assessed thereon and paid under protest and suit was brought against the county to recover the same. The defendant's demurrer to the complaint was sustained without leave to amend and appeal was taken from the judgment of dismissal.

The appellant contended that by reason of the enactment of the Personal Income Tax Act (Stats. 1935, page 1090) effective June 13, 1935, and the amendment to Section 3627a (Stats. 1935, p. 2251) effective September 15, 1935, the taxes imposed on her intangibles were illegally imposed and collected.

Section 3627a, as amended, provided that if and when a net

income tax should be adopted intangibles, except solvent credits, should no longer be taxable. A saving clause read as follows:

“Provided, however, that any and all taxes imposed on such property prior to the passage or adoption of such net income tax and the effective date thereof shall remain fully collectible and distributable hereunder.”

In denying relief to the appellant the court said (page 86):

“As appears from the above chronological statement, a tax was ‘imposed’ upon the plaintiff’s stocks and bonds by the express language of Section 3627a on the first Monday of March, 1935. At the time such tax was ‘imposed’ there was no income tax act in existence. The latter act was not effective until June 13, 1935, though the tax therein provided for was to be computed on income derived on or after January 1, 1935. In view of this chronology, we think the conclusion is inescapable that the proviso or ‘saving clause’ in Section 3627a relates specifically and solely to the tax which was ‘imposed’ and became a lien on the first Monday of March, 1935. In adding the proviso, it was the undoubted purpose of the legislature to make it plain that the *ad valorem* tax so imposed in March, 1935, prior to the enactment of the income tax but subsequent to the date from which such substituted income tax was to be computed, was not to fall within the in lieu provision contained in the earlier portion of the 1935 amendment of Section 3627a. This intention clearly appears from the language employed by the legislature.”

The importance of the decision so far as our present inquiry is concerned is in certain language used by the court. At page 84 the court refers to the *ad valorem* tax imposed as of the first Monday in March by Section 3627a prior to the 1935 amendment and states that this tax “was immediately due and payable except when, by virtue of the provisions of Section 3717 of the same code, it became a lien on any real property of the taxpayer, which

lien attached as of the same date.” And at page 87 the court said:

“Aside from our conclusion that the legislature clearly evidenced its intention to save and to make ‘fully collectible and distributable’ such *ad valorem* taxes as had been imposed on intangible personal property in March, 1935, prior to the enactment of the substituted income tax, we are also of the view that a statute (such as the 1935 amendment of Sec. 3627a) releasing property from a particular form of tax should be strictly construed against the taxpayer. (*Hunton v. Commonwealth*, 166 Va. 229 (183 S. E. 873).) Such a statute differs from one imposing a tax which is construed liberally in favor of the taxpayer. Here we find no clear legislative expression vitiating the already imposed 1935 *ad valorem* tax on intangible personal property, assuming such power rests in the legislature. Such intention certainly should not be implied. In fact, as already shown, the legislative intention appears to be clearly to the contrary.”

By use of the words “assuming such power rests in the legislature” we think the court must have had in mind the well-established principle that the legislature cannot constitutionally forgive taxes which have already accrued and become payable, since to do so would violate the gift provision of Section 31 of Article IV of the Constitution.

See *Estate of Stanford*, 126 Cal. 112

Trippett v. State, 149 Cal. 521

Estate of Potter, 188 Cal. 55.

Assuming then, as I feel we must do, that if property is taxable on the first Monday in March, the taxes thereafter assessed thereon become a lien as on that date, it follows that these taxes must be either paid by the owner of the property on the first Monday in March, or paid out of the condemnation award. In view of the case the date of the taking by the United States, if on or after the first Monday in March, is immaterial.

If the property owner does not pay the taxes and thus avoid the automatic imposition of penalties, these penalties will attach upon the dates provided therefor by law and will be payable out of the award.

It will be to the taxpayer's interest, therefore, to see that current taxes are paid prior to the accruing of penalties, and if necessary he should personally advance the funds for this purpose instead of assuming that the taxes would be paid out of the award prior to penalty dates. Such an assumption might be contrary to the facts as it might take the court considerable time to make its final decree and order for payments out of the award. The important thing to be borne in mind is that the deposit of an amount in court does not of itself constitute a payment of the taxes, and that the dates for payment are fixed by statute and penalties attach as of certain other dates.

United States Court of Appeals

FOR THE NINTH CIRCUIT

**COUNTY OF SAN DIEGO and
THE CITY OF SAN DIEGO,
Appellants,**

v.

**UNITED STATES OF AMERICA,
Appellee,**

and

**CHARLES W. CARLSTROM,
SOUTHERN CALIFORNIA CHILDREN'S
AID FOUNDATION, INC. , a corporation,
SOUTHERN CALIFORNIA DISTRICT
COUNCIL OF THE ASSEMBLIES OF GOD,
INC. , a corporation, and THE SALVATION
ARMY,
Appellees.**

**BRIEF FOR APPELLEES.
CHARLES W. CARLSTROM, ET AL .**

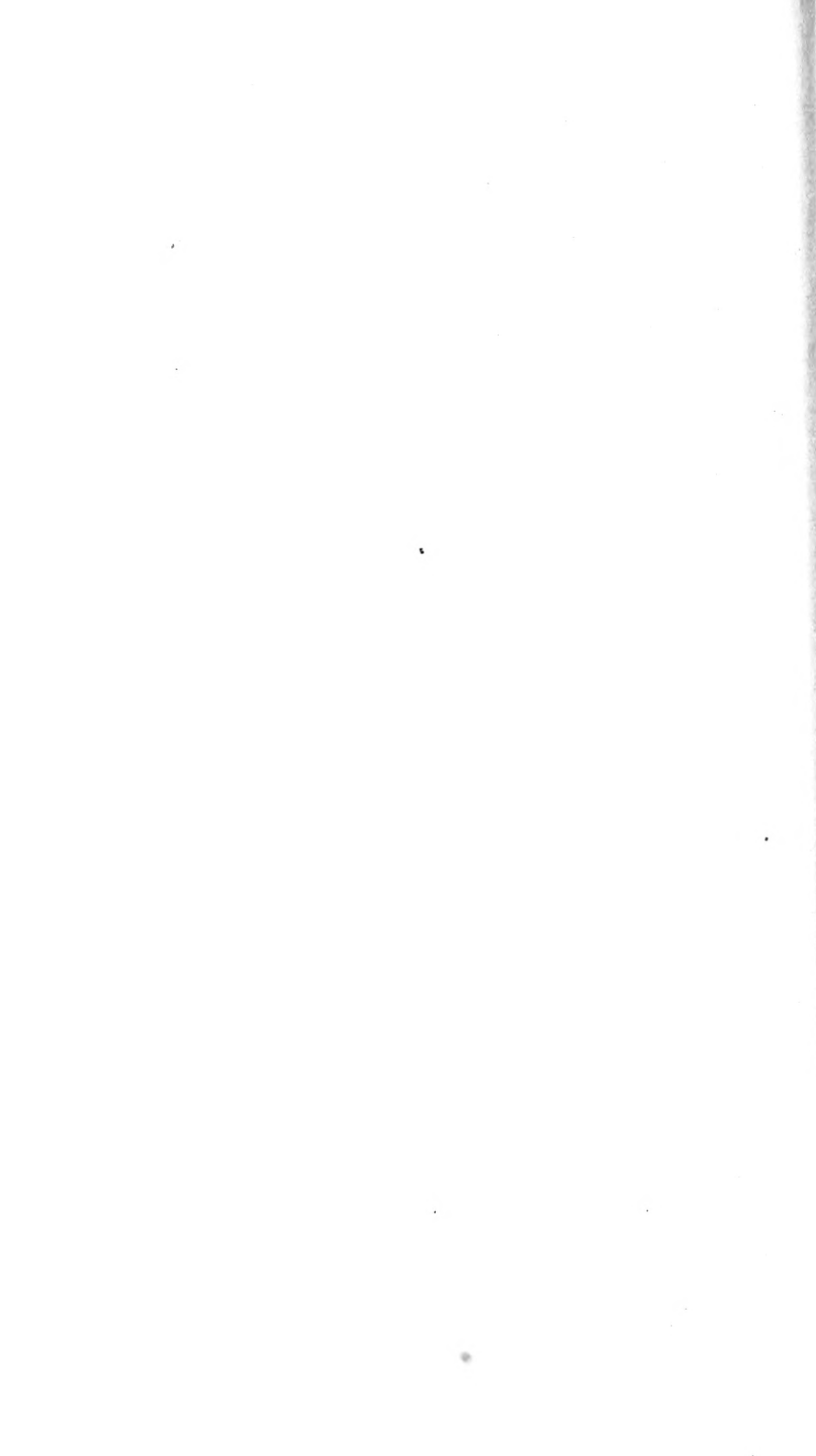
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FILED

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No. 15352

IN THE
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COUNTY OF SAN DIEGO and
THE CITY OF SAN DIEGO,
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v.

UNITED STATES OF AMERICA,
Appellee,

and
CHARLES W. CARLSTROM,
SOUTHERN CALIFORNIA CHILDREN'S
AID FOUNDATION, INC., a corporation,
SOUTHERN CALIFORNIA DISTRICT
COUNCIL OF THE ASSEMBLIES OF GOD,
INC., a corporation, and THE SALVATION
ARMY,

Appellees.

BRIEF FOR APPELLEES,
CHARLES W. CARLSTROM, ET AL.

THE QUESTION ON APPEAL AND STATUS

OF FORMER OWNERS

The sole question involved in the two appeals taken in this matter is:

What has become of the tax lien on the condemned property and the tax liability of its former owners as a consequence of taking by the United States?

The lower court adjudged that the lien and the liability are both dissolved. The County of San Diego and the City of San Diego contest this, and argue that the lien has attached to the fund payable to the former owners and that the liability still resides with them.

The United States and the former owners deny both contentions and undertake to sustain all the terms and effect of the Nunc Pro Tunc Judgment as of July 10, 1956. The views of the United States were advanced in the Court below upon its Motion for Summary Judgment and by the original owners of the property upon their motion to strike the answer of the County and City which set up the tax lien and demanded its payment out of the amount awarded by the jury.

We regard the motion to strike (filed by predecessor attorneys, who also took the appeal for the former owners) to amount to a general demurrer. This was overruled by the lower court which then proceeded to render judgment for the owners, so that their motion and appeal are of no further moment.

The Nunc Pro Tunc Judgment, effecting adjudication

of the rights of the owners in respect to tax liability, is of vital interest. Had it been adverse we should have appealed. Being favorable, we heartily join the government in its effort to sustain the judgment. We cannot see that the effect of this final judgment is in any way weakened by the fact that it was procured on motion of the plaintiff or that appellants' application for the same relief by way of motion to strike was not granted.

The judgment Nunc Pro Tunc was rendered after notice to all parties and after argument from all angles. It is just as binding on the owners as upon the government and upon the municipalities. Accordingly this brief properly constitutes an answer to the brief for appellants County of San Diego and the City of San Diego, on Appeal, although Carlstrom and his associate owners were originally denominated appellants rather than appellees.

COMMON INTEREST OF GOVERNMENT

AND FORMER OWNERS

Appellants, County and City, make some show of objection against the right and propriety of the Government's interest in this behalf, but they must concede the right of the former owners to defend the full amount of their award and their freedom from personal liability. It is not requisite for this that we sustain the validity of our motion to strike. It is enough that we sustain the equity and justice of the final judgment which is under attack by the County and City.

Strictly speaking, the Government has no interest in distribution of the award. It does have an indirect

interest in behalf of its citizens and a more direct interest in protecting itself in future condemnation cases from any tendency of congress, juries or judges to throw into the considerations of a jury the factor of prepayment of taxes as an element of value to the property. Under the present laws and practice, of course, it is not proper that a court or a jury take into account, in fixing value, any tax penalty which might fall upon the original owner.

If the result of this appeal or others should be to require such an owner to pay to taxing authorities "un-earned" taxes for which he will never derive benefit, it will become appropriate to have legislation which will shift the burden to the condemner. The contentions of the County and City demand inequity and we take it that the Government, for its own future financial protection, may well file and maintain its appeal which is designed also to promote equity and fair dealing, even toward an adversary party in the present litigation.

In any event, it is the desire and duty of this court to administer justice to all parties without regard to the source from which the point is raised and without regard to the particular form in which it came up in the court below or upon appeal to this court.

SOURCE AND PURPOSE OF FEDERAL

COURT POWERS

The trial court is, by the Federal Statute, given wide latitude in its disposition of the fund contributed by the condemner.

"The court shall have power to make such

"orders in respect of incumbrances, liens, rents, taxes, assessments, insurance, and other charges as may to it be just and reasonable. "

U. S. Code, Title 40, 258 (a).

Appellants, and, we must concede, many court decisions loosely allude to this comprehensive power of the court as a "transfer" of a tax lien from the real estate to the fund deposited or to be deposited. Some state statutes doubtless provide for this, but not so in California. We have no fault to find with the attorneys of the taxing authorities, or indeed with the County and City officials, for their endeavor to garner for the local treasury a windfall in the way of unearned tax money. It is doubtless their duty to pursue a technicality to that end. On our part we feel free to condemn any strained construction of court decisions or statutory law which would require an owner to pay taxes on real property which are not payable or even ascertained until long after the real estate has passed into an untaxable domain. Such, according to the contentions of the appellants, would be the effect of the inchoate lien which attached March 7, 1955, as the initial step in raising tax money to be expended during the fiscal year July 1, 1955, to June 30, 1956.

Appellants depend primarily upon the assertion in their brief that "the passing of title effects a transfer of the lien from the land to the deposit". (Brief, p. 14) They cite no statute, State or Federal, which so declares. We are unaware of any legislation to such effect. The court decisions, cited by appellants, which use such language do so with the evident intention of characterizing the final effect of the equitable and just order which the

the trial court, sitting in the specific condemnation case, made under the particular facts and law of that case. There is no law which operates to create an automatic transfer of a tax lien on land to moneys deposited in the court registry.

Neither is there any law which requires that a court shall recognize and decree such a transfer where it will not be in furtherance of justice and equity. U. S. Code Title 40 Sec. 258 (a) contains the full authority under which Judge Carter exercised his judicial discretion in this case. Naturally, in so doing he took into account all statutory and judicial law of the State of California in which the land lies. He took into account the inequity of appellants' demand for unearned tax money. He took into account the same "statutes involved" as are quoted in appellants' brief. (P. 3-9). He took into account the equitable and just intentions of the California legislature as manifested in Sec. 4986 and Sec. 4986.2 of the California Revenue and Taxation Code as well as in the California Code of Civil Procedure Sec. 1252.1, all of which were in full force and effect on the date of taking.

Whatever statutes and whatever factual circumstances may have existed in the multitude of other decisions in other cases, we submit that the court below was confronted with no dictate of equity and no statutory restriction which required it to enrich the County of San Diego or the City of San Diego at the expense of either the United States of America or the private owners of the land condemned by it at a time when it was impossible for anyone to pay the taxes.

The California Revenue and Taxation Code, Secs. 4986, 4986.2 (quoted pp. 4-6 Brief of Appellants)

manifests the intention of the California Legislature to clear land taken by the United States, as well as the United States itself, of all liability which has attached by way of tax lien.

California Code of Civil Procedure 1252.1 manifested a like intention except in the case where the fiscal year had already begun to run at the date of taking. In our case the lien attached March 7, 1955. Title passed to the Government June 16, 1955. The fiscal year commenced July 1, 1955. Taxes became due and payable November 1955, so there was no occasion for prorating.

Despite appellants' criticism of the form of Code of Civil Procedure 1252.1, the substantive portion thereof justified the Federal court in its complete cancellation of the 1955 tax levy. Except for the next to the last paragraph (See Appellants' Brief, p. 8) the provisions of the section are purely procedural as to the manner in which a portion of a tax levy may be preserved to the benefit of the taxing agency. It is conceded, in our case, that the fiscal year had not commenced to run, so the whole tax was "unearned" at the time of taking. Therefore, even in a California state condemnation there could have been no order for payment of a pro-rate based on the fiscal year, and the State court would have been obliged to carry out the instruction of the statute, "* * * and said judgment shall, in addition to ordering said payments, order the cancellation as of the date of judgment, of all taxes, current and delinquent, and all penalties and costs on said property * * * ". Cal. Code of Civil Procedure 1252.1 (Emphasis added)

Since it thus appears that under the California law in effect June 16, 1955, a California court was forbidden

by statute to require payment out of the award of any lien except on the basis of prorating it over a fiscal year which had started to run prior to passing of title, the lower court has followed the statute in the Summary Judgment. Date of passing title would, of course, be the date of judgment in the State court, whereas it is date of taking in the Federal court.

The City and County authorities, in their quest of revenue, are now encouraged by their learned legal advisors to believe that they may collect taxes upon Federal lands which are in exempt classification. According to the views expressed in their brief, it is only necessary that the Government shall acquire the property immediately after the first Monday in March rather than immediately before that lien date; that is to say, in the year 1955, if title passed March 6, the property goes untaxed. If title passed March 8, - or thereafter before the fiscal year began as in our case - the taxing authorities come into \$333,164.34.

If a City or a County may thus scoop up bounty from the sea by dropping a net overboard months in advance of the commencement of each fiscal year, they might as well impose the lien a full year before and so encompass even more passing schools of fish! Such happy windfall would come about without regard to the fiscal year and without regard to the benefits and services supposed to be provided by the taxing authorities throughout that period, to be paid for through the tax collection becoming payable November 1st following. Thus we feel secure in referring to the taxes for a fiscal year to commence July 1st as "un-earned".

CALIFORNIA TAX CALENDAR

Appellants quote in their brief (P. 3-9) various excerpts from California laws, as "Statutes Involved". Others should be noted, namely, the whole annual tax program of California. It comprises many steps by which expenses of the fiscal year are to be raised. Attaching of the lien determines no amount and permits of no payment. The first Monday in March is merely the starting point and if the matter rested there no tax would ever be levied and no sum would ever become due.

We refer for sequence purposes to the following statutory provisions found in the California Revenue and Taxation Code:

Sec. 117 defines the "lien date" as the time when taxes for any fiscal year become a lien.

Sec. 201 provides that all property in the State is subject to taxation except such as is exempt under the laws of the United States or of California.

Sec. 202 refers to the Constitutional exemptions from taxation concluding with "(e) property that is exempt under the laws of the United States".

Sec. 405 requires the Assessor to fix the assessed value of all property during March, April, May and June.

Sec. 407 requires the Assessor to transmit his statistical statement to the Supervisors.

Sec. 1843 requires the Auditor to amend the rolls in accordance with any action by the Board of Equalization.

Sec. 2151 requires the Board of Supervisors to fix the tax rate.

Sec. 2152 requires the Auditor to compute and enter the tax against respective properties.

Sec. 2186 declares that every tax has the effect of a judgment against the person.

Sec. 2187 declares that every tax on real property is a lien against the property assessed.

Sec. 2192 declares that all tax liens attach annually as of noon the first Monday of March preceding the fiscal year for which taxes are levied.

Sec. 2193 declares that every lien has the effect of an execution duly levied against the property subject to the lien.

Sec. 2194 declares that such judgment may be satisfied and the lien be removed "when and not before" (a) the tax is paid or legally cancelled, or (b) the property is sold or deeded to the State for non-payment.

Sec. 2601 requires the Auditor to transmit the roll to the Tax Collector.

Sec. 2605 declares the first half of the tax due and payable November 1.

Sec. 2606 declares the second half due and payable January 20.

Sec. 4986 provides for cancellation of all or any

portion of an uncollected tax where manifestly it would be improper to collect it; as where it was levied or charged (a) more than once, (b) erroneously or illegally, * * * (f) on property acquired after the lien date by the United State of America, if such property upon such acquisition becomes exempt from taxation under the laws of the United States. (Full text in Appellants' Brief p. 45)

These tax statutes have long been in force and effect. California Code of Civil Procedure Sec. 1252.1. (Full text in Appellants' Brief pp. 6-9) was also in effect at the time the United States acquired title to the property here in question. It stood, in our case, at and after the time of taking as the only authorization for collecting any taxes from Government acquired property. Clearly the statute forbade the court to require even so much as a pro-rate except on the basis of the subsequent fiscal year, which in our case never did begin to run so far as this parcel was concerned.

Our purpose in detailing the tax calendar and general provisions of the California statutes is to show the absurdity of appellants' contention that the vaunted tax lien, in our case, had any substance which could endure. The only logical result is that the 1955 tax lien withered on the vine and never came to such fruition as would require either the Government or the original owners to contribute \$333,164.34 to the County and City coffers.

Brief writers and decision writers have heretofore alluded to the California tax lien as an "inchoate lien". Indeed it is such during the first few months of its existence. At its inception on the first Monday in March it is no more than three lines in a code book. (Revenue

and Taxation Code, Sec. 2192). A half dozen subsequent steps by several different public officials are required before anyone knows how much is the tax on what property. Only then does the potential lien become complete.

By that time in 1955, in our case, the condemned property was exempt from taxation. No one of the seven public officials involved had authority to engage in any further taxation process upon it. In contemplation of law the levy was off the tax rolls, as Judge Carter virtually held in the judgment in the court below.

If we are right in our contention that there is no such thing as an automatic transfer of a tax lien on land to the fund deposited in court to meet the purchase price, action of the court under U. S. Code, Title 40, Sec. 258 (a) is required to accomplish this. In our case there has never been any such order.

The records show that the United States of America has held title since June 15, 1956, and no taxes have been paid.

Is the property acquired by the Government still subject to an execution duly levied as the Code provides? (Revenue and Taxation Code, Sec. 2193)

Is it still subject to sale or deed to the State? (Revenue and Taxation Code, Sec. 2194)

In a case such as ours, there is only one avenue of escape from such eventuality defined by the California Codes.

"Satisfaction of judgment and removal of lien.

"Except as otherwise provided in this chapter, the judgment is satisfied and lien removed when, but not before, (a) the tax is paid or legally cancelled or, (b) for nonpayment of any taxes, the property is sold to a private purchaser or deeded to the State. "

California Revenue and Taxation Code,
Sec. 2194.

Obviously, in this case, the only machinery provided by California tax law for compliance with the constitutional guaranty of non taxability which will clear the assessment rolls, is by "legal cancellation" such as was recorded by the judgment appealed from.

APPELLANTS' CITATIONS DISTINGUISHED

Appellants cite three California decisions in support of their byword that "the lien of taxes is held to be transferred from the land to the award on deposit with the court" (p. 12). None of them so holds.

In Weston Investment Co. v. Calif., 31 Cal. 2 390, the California Supreme Court merely says:

"Under the provisions of Section 258 (a) of Title 40 of the United States Code taxes which are a lien on property when a declaration of taking is filed may be ordered paid out of the estimation compensation fund. (Federal Citations).." (Emphasis added) p. 391.

In City of Los Angeles v. Superior Court, 2 Cal. 2nd, 138 the California Supreme Court quoted Sec. 1248

of the California Code of Civil Procedure and merely sustained the right of the City to withhold from the award fixed by the judgment the sum necessary to pay street assessment liens in accordance with that code provision.

In Marin Metropolitan Water District v. North Coast Water Co., 40 Cal. App. 260, the court did not, as intimated (p. 12) hold that the lien was transferred to the land. That action was by a condemner who failed to exercise the option given by Code of Civil Procedure Sec. 1248 to "deduct from the judgment" the amount of the tax lien. The court held that the condemner could not thereafter recover the amount of the taxes from the owner who had received the full amount of judgment. This case was cited with approval by the California Supreme Court in the foregoing decision, City of Los Angeles vs. Superior Court, 2 Cal. (2nd) 138.

The reasoning in both cases seems to parallel our own: Unless the condemner demands payment from the award, no obligation to pay the tax attaches to the fund or its recipient.

CALIFORNIA STATUTES DO NOT PROVIDE FOR,
BUT INSTEAD FORBID TRANSFER

It should be noted that a number of cases on which appellants rely for support of their catch phrase "transfer of lien", arise out of circumstances which clearly required resort to the fund to avoid unjust enrichment of the property owner.

In Wilson v. Belville, 47 A. C. 857, an overdue

street bond was the lien. Such also was the charge in Thibodo vs. U. S., 187 F. 2nd 249. In both cases the property owner had received the benefit of street improvements prior to the taking and the value had been increased so that the award was properly that much more than it would have been if there had been no improvement and no bond lien. In other words, here was a fully earned and fully enjoyed tax. Under Sec. 258 (a) U.S.C.A. a court of equity might well exercise its power and "transfer" the lien by directing that the tax be paid out of the fund.

May we reiterate that in all such cases there was no automatic transfer. It required exercise of the judicial function and the gist of the decisions is no more than to declare that the fund is "available" as a medium for doing justice amongst the parties.

"The status of taxes as liens is to be determined by the laws of the particular state. After the property is taken by the Government it is exempt from State taxation and this gives rise to the question as to whether the taking is within a current tax period."

U.S.v. Certain Lands, 40 F.Supp.436(443)

A strict analysis of the California Condemnation Statute discloses a restriction actually imposed by the legislature which a Federal court should observe. Casual observation does not show that other states have not gone to this extent in their statutes.

If California intended to transfer a lien on land and by operation of law attach it to the award to be paid by the condemner, the natural place to say so would be in Code

of Civil Procedure Sec. 1248. The actual provision is wholly inconsistent with such an intention. If a "transfer" automatically occurred there would be no option left to the condemner either to withhold the amount of the lien, as the statute in so many words authorizes, or to waive the withholding privilege. In the present case, of course, the United States did not elect to exercise such option but on the contrary took the position, correctly we believe, that there was, and is no lien because the Government acquired title prior to commencement of the fiscal year.

We discern no significance in appellants' contention that, under California State procedure, title passes at the end of the case, whereas under Federal procedure it usually passes at the commencement. California Revenue and Taxation Code, Sec. 4986, merely times the lien with reference to the date of acquisition. This would mean, on date of deed in case of voluntary sale; on date of filing and deposit in case of Federal court action; on date of final judgment in case of State court action.

California Code of Civil Procedure, Sec. 1252.1 measures the amount of the lien by reference to commencement of the fiscal year (July 1). If the year has not commenced prior to passage of title, there is no basis for collection.

CANCELLATION IS MANDATORY

ON GOVERNMENT TAKING

Appellants valiantly labor the point that California Revenue and Taxation Code Sec. 4986 uses the word "may

instead of "shall" in providing for cancellation of taxes "by the auditor on order of the Board of Supervisors with the written consent of the district attorney."

To put their argument in reverse form, appellants contend that although concededly the Government takes title free of all taxes and tax liability, either the auditor or the board of supervisors or the district attorney by declining to concur in cancellation may compel the tax collector to treat the property as being still on the tax rolls. This, of course, would be absurd, so in spite of the general definition of "may" and "shall" (occurring some 4970 sections back in the statute) the use of the more permissive word makes the cancellation none the less mandatory. Recent decisions of the California courts confirm this construction.

Carter v. Seaboard Finance Co., 33 Cal. 2nd 564 (Syl. 10, 9B p. 573)

Hochfelder v. L. A. County, 126 Cal. 2nd 370 (Syl. 4, p. 375)

We must note a further mis-citation on the part of appellants. On page 10 of their Brief, they cite three California Supreme Court decisions in support of their contention that "may" in Section 4986 is not mandatory:

Sherman v. Quinn, 31 Cal. 2d, 661

Vista Irr. Dist. v. Supervisors, 32 Cal. 2d 477

Security First National vs. Supervisors,
35 Cal. 2d 323.

The word is not even mentioned, the holding being that mandamus does not lie to compel cancellation where another remedy is available. (Here we had available the remedy afforded by Sec. 258, Title 40, the U.S. Code).

INVOLUNTARY SELLER IS ENTITLED
TO JUSTICE AND REASON AS WELL
AS VOLUNTARY

Appellants (p. 11, Brief) seek to draw a distinction between what may be "just and reasonable" where a Governmental agency deals with a land owner and where the acquisition results from negotiation and purchase as distinguished from condemnation.

In the first place, it is inconceivable that an owner would voluntarily sell land to any buyer before the beginning of a fiscal year unless the buyer assumed all responsibility for discharge of an existing tax lien, inchoate or matured. Universal custom is for a prorating if title passes after July 1st. If title passes before that date the buyer assumes all. It would be grossly unjust and unreasonable for the buyer and seller to agree upon the fair market price and then allow the buyer to deduct \$333,164.34 for unearned taxes not yet determined or payable. This is what appellants' proposition amounts to.

Appellants then suggest that the United States, as a negotiating buyer, could afford to pay the full market value because it could then turn around and have the tax liability cancelled. This is precisely what the court below sought to accomplish by its Summary Judgment. Undoubtedly it is what the jury would have done if the question had been left to them. The taxing authorities themselves virtually say:

"If the jury price had been an agreed price between you, we would gladly cancel the \$333,164.34. Since it was determined after an adversary trial, our hands are tied. "

Fortunately the court, in the exercise of its equitable jurisdiction had power to cut the knot and did so.

NO GIFT OR TAKING WITHOUT
PROCESS INVOLVED

Appellants' final point is that the Federal Court has, by its Summary Judgment, taken property of the County and City (tax proceeds) without due process of law and has compelled a gift of it to appellees. The answer to this is simple. The constitutional provisions, state and national, establishing comity between governments, in no wise operate as gifts. This is true even though benefits to private persons may result (Cal. Emp. etc. v. Payne, 31 Cal. 2d, 216). Due process of law has been invoked in this very action and is being pursued in this appeal.

The former owners of the condemned property, appellees in the appeal of the County and the City of San Diego, (originally appellants in their own separate appeal), respectfully submit that the Judgment Nunc pro Tunc should be affirmed. Under the general powers conferred by Sec. 258 (a) U. S. C. Title 40, it provides the only just and equitable disposition of the former tax lien. Furthermore, it is in full accord with the pertinent California Codes which were in force and effect at the time of taking, in particular Revenue and Taxation Code, Sections 4986, 4986.2 and Code of Civil Procedure Sec. 1252.1.

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a corporation, and THE SALVATION ARMY,
Appellees.



**In the United States Court of Appeals
for the Ninth Circuit**

COUNTY OF SAN DIEGO AND CITY OF SAN DIEGO,
APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

CHARLES W. CARLSTROM, SOUTHERN CALIFORNIA
CHILDREN'S AID FOUNDATION, INC., a Corporation,
SOUTHERN CALIFORNIA DISTRICT COUNCIL OF THE
ASSEMBLIES OF GOD, INC., a Corporation, and THE
SALVATION ARMY, APPELLANTS

v.

COUNTY OF SAN DIEGO, APPELLEE

Appeal from the United States District Court for the
Southern District of California, Southern Division

BRIEF FOR THE UNITED STATES, APPELLEE

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FILED



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for the Ninth Circuit**

No. 15352

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SALVATION ARMY, APPELLANTS

v.

COUNTY OF SAN DIEGO, APPELLEE

Appeal from the United States District Court for the
Southern District of California, Southern Division

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The memorandum opinion of the district court
(R. 54-65) is not reported.

JURISDICTION

This is an appeal from a final judgment of the
district court entered pursuant to Rule 54(b), Fed-

eral Rules of Civil Procedure, granting a summary judgment against San Diego County on its claim for county, city and school district taxes for fiscal year 1955-1956.

The district court has jurisdiction of the condemnation proceeding under 28 U.S.C. sec. 1358. The authority for the taking is the Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. sec. 258a, and acts supplementary thereto and amendatory thereof; Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. sec. 257; Act of August 18, 1890, 26 Stat. 316, as amended by Acts of July 2, 1917, 40 Stat. 241, and April 11, 1918, 40 Stat. 518, 50 U.S.C. sec. 171, which acts authorize the acquisition of land for military purposes; Act of August 12, 1935, 49 Stat. 610, 611; 10 U.S.C. sec. 1343, a, b, and c, which act authorizes the acquisition of land for air force stations and depots; Act of July 26, 1947, 61 Stat. 495; Act of July 10, 1952, 66 Stat. 517, and Act of June 30, 1954, 68 Stat. 337, which acts authorize acquisition of land and appropriated funds for such purposes. Judgment was entered July 26, 1956, *nunc pro tunc* as of July 10, 1956 (R. 65-83). Notice of appeal was filed by the defendant County and City of San Diego, August 22, 1956 (R. 83). A cross-appeal by defendant landowners was filed August 31, 1956 (R. 84-85).

STATEMENT

This appeal arises out of a proceeding to condemn an aircraft manufacturing plant, Consolidated Aircraft Plant No. 2, at San Diego, California. The

United States filed the original complaint and declaration of taking April 29, 1953. An order was entered granting possession as of May 1, 1953, and the United States has since been in continuous possession. The original estate taken was a term for years commencing May 1, 1953, and ending June 30, 1954, extendible for yearly periods thereafter at the election of the United States until June 30, 1958.

The United States on June 16, 1955, filed its first amended complaint in condemnation and declaration of taking which provided for the taking of a right of exclusive use and occupancy from May 1, 1953, to the filing of the first amended complaint, and thereafter an estate in fee simple was taken (R. 3-11). Under the California statutes, tax liens attach annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied (Cal. Rev. & Tax. Code, sec. 2192, Br. 6). Thus when the fee title vested in the United States on June 16, 1955, pursuant to the declaration of taking, the tax liens for the fiscal year beginning July 1, 1955, had already attached. It was to remove the liens that the United States Attorney on November 5, 1955, mailed to the Board of Supervisors of the County of San Diego a petition for cancellation of the general taxes for the fiscal year 1955-1956 (R. 25-28). The Board of Supervisors denied the petition on January 10, 1956 (R. 29). San Diego County had in the meantime filed an answer in the condemnation proceedings on August 5, 1955, wherein it sets forth its interest in the property as being a lien for the City of San Diego, County of

San Diego and School District taxes for the fiscal year 1955-1956¹ which had become a lien on the first Monday of March, 1955 (R. 12). The amount of such taxes "will be ascertainable on or about October 1, 1955." (R. 12). The supplemental answer setting forth the exact amount of the taxes on each tract was filed by San Diego County on December 30, 1955, totalling some \$334,912.62. (R. 16-18).

The United States, upon denial of its petition to cancel taxes, made a motion in the United States district court, which was granted, for an order to show cause why the court should not direct the cancellation of taxes or in the alternative for summary judgment that the County take nothing by its answer (R. 18-43). The defendant landowners also made a motion to strike parts of the answer and supplemental answer of the County on the ground that the lien for taxes was not valid (R. 43-54). The order to show cause and the motion to strike having been heard together, the district court wrote a memorandum discussing at length the parties' contentions and on May 18, 1956, granted the motion of the United States for summary judgment and denied the motion to strike (R. 54-65). Final judgment, with findings of fact and conclusions of law, was docketed July 26, 1956 (R. 65-83). The judgment entered against the County was that it should take nothing by its answer and supplemental answer, and

¹ Incorrectly appearing in the record as being "for the fiscal year 1954-1955" (R. 12). The correct fiscal year, 1955-1956, appears in San Diego County's supplemental answer (R. 16).

that the United States and the defendant landowners should go free of all claims whatsoever which the County might assert on account of the taxes for fiscal year 1955-1956 against themselves, the condemned property or the funds deposited in court (R. 81). The district court also made an express determination that the claims for taxes were suitable for entry of a final judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure (R. 76, 80).

The only issue before the Court on these appeals concerns the summary judgment denying the tax claim. The issue of just compensation, not involved here, has been tried before the district court with a jury subsequent to entry of the July 26, 1956 judgment. The trial started on January 22, 1957, and the jury returned its verdict on May 27, 1957. The total award for all tracts is approximately \$1,729,000 as compensation for the term for years, and \$5,944,000 for the fee, including both the jury verdict and settlements on tracts not submitted to the jury. Final judgment has not been entered. Accordingly the time for appeal has not expired. It is entirely possible that an appeal from the final judgment awarding just compensation may be taken to this Court.

QUESTION PRESENTED

Whether the United States has the right under California law to have the uncollected taxes cancelled on Consolidated Aircraft Plant No. 2 where the property was acquired by condemnation after the lien date.

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ARGUMENT

I

The United States' Position on This Appeal

The United States agrees with appellants insofar as they argue that the issue before the Court is a matter of distribution (Br. 14-16), and, limited to this case, it is equally true that no direct financial benefit will accrue to the United States from this appeal. The United States does have a very substantial interest, however, in how the Court decides the issue appealed. Whether the United States is entitled to have uncollected taxes cancelled in the appropriate instances will have a grave effect on the handling and settlement of just compensation claims for property condemned in California. The United States is decidedly affected by the efficient management of condemnation proceedings. An everpresent factor in the prompt termination of condemnation proceedings, especially where there are compromise settlements, is taxes which will be payable out of the amount awarded or agreed on as just compensation. Naturally the landowner is only concerned with the net amount which will accrue to him. The United States is, conversely, concerned with the gross amount to be paid for the property condemned. Neither party can evaluate his position until his rights and responsibilities with respect to local taxes are firmly settled. Only then can it be definitely ascertained whether a suggested settlement figure or, indeed even a verdict, adequately compensates the landowner or is an excessive expenditure of Government funds.

The decision of this Court on whether the United States has a right to the cancellation of uncollected taxes under Sections 4986 and 4986.2 of the Revenue and Taxation Code of California is, therefore, one in which the United States is vitally interested.

II

Section 4986 Gives The United States An Unrestricted Right To Have Uncollected Taxes Cancelled On Property It Acquires After Lien Date

The United States has a complete, unfettered right under California statutes to have uncollected taxes cancelled on property acquired after the lien date where such property becomes exempt from taxation under the laws of the United States. California Revenue & Taxation Code, Secs. 4986, 4986.2.² The exact language of the pertinent portions of Section 4986 is:

All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be cancelled by the auditor on order of the board of supervisors with the written consent of the district attorney if it were levied or charged:

* * * *

(f) On property acquired after the lien date by the United States of America if

² Section 4986.2 is basically an incorporation of Section 4986 by reference, as applied to city taxes, with the substantive rights of the United States being the same in both sections. Therefore no separate argument will be presented for Section 4986.2 and all references to Section 4986 should be construed equally applicable to Section 4986.2.

such property upon such acquisition becomes exempt from taxation under the laws of the United States.

* * * *

Section 4986, which was recodified in 1939 (Stats. 1939, C. 154, P. 1366, Sec. 4986), is derived from Section 3804a of the Political Code. Section 3804a was consistently interpreted as being mandatory on the board of supervisors and not merely permissive notwithstanding the seemingly permissive language that the tax "may * * * be canceled * * *." Whenever the fact situation was such that the board of supervisors had authority to cancel under Section 3804a the California courts took the position that a writ of mandate would issue to compel cancellation. *State Land Settlement Board v. Henderson*, 197 Cal. 470, 241 Pac. 560 (1925); *City of Los Angeles v. Board of Supervisors*, 108 Cal.App. 655, 292 Pac. 539 (3d Dist. Ct. of App., 1930), hearing denied by Sup. Ct. 1930; *People v. Board of Supervisors*, 126 Cal.App. 670, 15 P.2d 209 (3d Dist. Ct. of App., 1932), hearing denied by Sup. Ct. 1932; *City of Los Angeles v. Ford*, 12 Cal.2d 407, 84 P.2d 1042 (1938); *Glen-Colusa Irr. System v. Ohrt*, 31 Cal.App.2d 619, 88 P.2d 763 (3d Dist. Ct. of App. 1939); see *Anderson-Cottonwood Irr. Dist. v. Klukkert*, 13 Cal.2d 191, 88 P.2d 685 (1939).

The issuance of writs of mandate to compel cancellation of taxes in appropriate situations has been continued since 1939 under Section 4986 of the Revenue and Taxation Code. *Bank of America Nat. T. & S. Ass'n v. Board of Supervisors*, 93 Cal.App.2d

75, 208 P.2d 772 (2d Dist. Ct. of App. 1949), hearing denied by Sup. Ct. 1949; *Oakdale Irr. Dist. v. County of Calaveras*, 133 Cal.App.2d 127, 283 P.2d 732 (3d Dist. Ct. of App. 1955), hearing denied by Sup. Ct. 1955. See *Pomona Cemetery Ass'n v. Board of Supervisors*, 49 Cal.App.2d 626, 122 P.2d 327 (1st Dist. Ct. of App., 1942), hearing denied by Sup. Ct. 1942.

The use of the word "may" in this statute as a command is consistent with a general rule of statutory construction which has been adopted by the California courts. The rule is explained as follows in *Harless v. Carter*, 42 Cal.2d 352, 356, 267 P.2d 4, 7 (1954):

Certainly, he might not have refused to act upon the ground that the statute states that he "may" sell upon the demand of a bondholder "where persons or the public have an interest in having an act done by a public body 'may' in a statute means 'must.' (Citation.) Words permissive in form, when a public duty is involved, are considered as mandatory." *Uhl v. Badaracco*, 199 Cal. 270, 282, 248 P. 917, 921. "Where the purpose of the law is to clothe public officers with power to be exercised for the benefit of third persons, or for the public at large—that is, where the public interest or private right requires that the thing should be done—then the language though permissive in form, is peremptory." *County of Los Angeles v. State*, 64 Cal. App. 290, 295, 222 P. 153, 156.

Other cases which have followed the holding in *County of Los Angeles v. State* are: *Stockton Plumb-*

ing & Supply Co. v. Wheeler, 68 Cal. App. 592, 599, 229 Pac. 1020, 1023 (3d Dist. Ct. of App. 1924); *Capt. C. V. Gridley Camp No. 104 etc. v. Bd. of Sup. of Butte County*, 98 Cal.App. 585, 596, 277 Pac. 500, 505 (3d Dist. Ct. of App. 1929); *Bell v. Redwine*, 98 Cal. App. 784, 787, 277 Pac. 1050, 1051 (3d Dist. Ct. of App. 1929); *Bates v. McHenry*, 123 Cal.App. 81, 91, 10 P.2d 1038, 1042 (3d Dist. Ct. of App. 1932); *Kentfield et al. v. Reclamation Board*, 137 Cal.App. 675, 684, 31 P.2d 431, 436 (3d Dist. Ct. of App. 1934); *People v. Noggle*, 7 Cal.App.2d 14, 19, 45 P.2d 430, 433 (3d Dist. Ct. of App. 1935); *In re Grafmiller's Estate*, 27 Cal.App.2d 253, 256, 81 P.2d 181, 183 (3d Dist. Ct. of App. 1938).

Section 4986 as it has been construed by the California courts is clear enough. All or any portion of any uncollected tax levied may, on satisfactory proof, be cancelled if levied on property acquired after the lien date by the United States. This is mandatory insofar as the order by the board of supervisors or consent of the district or city attorney is concerned. The district court, familiar as it was with the California law, so held, saying that "the word 'may' in this section means 'must' " and that "there is no discretion involved in the requested actions of the Board of Supervisors" (R. 59). The substantive right to cancel the uncollected tax having been granted by laws of California to the United States, it is not open to the County and City of San Diego to question how or under what circumstances the United States may exercise its rights.

The appellants advance the proposition that taxes

which constitute a lien upon the land at the time of condemnation are ordinarily payable out of the award (Br. 9). Of course, that is true. See e.g., *Washington Water Power v. United States*, 135 F.2d 541 (C.A. 9, 1943), cert. den. 320 U.S. 747 (1943). A tax lien or any other valid lien is a prior charge on the amount paid as compensation for the taking of the property. *Thibodo v. United States*, 187 F.2d 249, 256 (C.A. 9, 1951). But the right of the state or its subdivisions to collect taxes out of a condemnation award is not the question now before this Court. The question is whether California has, voluntarily, given the United States the right when it condemns property to have uncollected taxes cancelled. The authority cited above shows that California has granted such a right to the United States.

The principal argument on which the appellants rely is that Section 4986(f) was not intended to apply to condemnation cases, but only purchases on the open market. Appellants cite absolutely no authority to sustain their conjecture. What was intended by this section must be derived from the words of the statute itself. There could be no more apt place to apply the basic rule of statutory interpretation, "where the words are plain there is no room for construction." *Osaka Shosen Line v. United States*, 300 U.S. 98, 101 (1937). In this case, the words say that uncollected taxes may be cancelled "on property acquired after the lien date by the United States." Appellants argument really is that "acquired" should be amended to read "acquired by purchase in the open market" or "acquired except where

acquisition occurs through use of eminent domain proceedings." But the statute does not so provide. It is applicable to all property "acquired" without exception as to the means of acquisition and would thus embrace purchase, donation, eminent domain, seizure or any other mode of acquisition of property.

The California Supreme Court has specifically held that the power to "acquire" includes the power to acquire by condemnation. *Deseret Etc., Co. v. State of California*, 167 Cal. 147, 157, 138 Pac. 981, 985 (1914), reversed on other grounds, *California v. Deseret Etc., Co.*, 243 U.S. 415 (1917). See also *Clark v. Los Angeles*, 160 Cal. 30, 48, 116 Pac. 722, 729 (1911), holding that the word "acquire" has a broader meaning than merely "purchase."

Appellants contend that *City of Los Angeles v. Board of Supervisors*, 108 Cal.App. 655, 292 Pac. 539 (3d Dist. Ct. of App. 1930), and related cases, cited on p. 8, *supra*, and holding that the right to have taxes cancelled given by Section 4986 are mandatory, have been "superseded," meaning overruled. Appellants rely on *Sherman v. Quinn*, 31 Cal. 2d 661, 192 P.2d 17 (1948); *Vista Irr. Dist. v. Bd. of Supervisors*, 32 Cal.2d 477, 196 P.2d 926 (1948); *Security First National Bank v. Board of Supervisors*, 35 Cal.2d 323, 217 P.2d 948 (1950). Appellants' contention that these cases "supersede" *City of Los Angeles v. Board of Supervisors* and related cases is not well taken. On the same day the California Supreme Court decided *Sherman v. Quinn*, *supra*, it applied in two related cases the prior holdings of *State Land Settlement Board v. Henderson*,

197 Cal. 470, 241 Pac. 560 (1925), and *People v. Board of Supervisors*, 126 Cal.App. 670, 15 P.2d 209 (3d Dist Ct. of App. 1932). *Eisley v. Mohan*, 31 Cal.2d 637, 192 P.2d. 5 (1948); *Dept. of Veterans affairs v. Board of Supervisors*, 31 Cal.2d 657, 192 P.2d 22 (1948). In neither case is there even the slightest indication that *State Land Settlement Board v. Henderson*, *People v. Board of Supervisors* or related cases have been overruled, superseded or modified in any way. To the contrary, the California Supreme Court said in *Dept. of Veterans Affairs v. Board of Supervisors* (*supra*):

Had the state agency been the owner of the property at the time the application for the cancellation of taxes was made, it would have been entitled to the relief sought.³ *People v. Board of Supervisors of Calaveras County, supra*. [31 Cal.2d 659, 192 P.2d 23.]

The three cases relied on by appellants at most merely restate the well established rule that a writ of mandate will not issue where there is an adequate remedy at law. To insist, as appellants do, that "the right of cancellation no longer exists" is to ignore subsequent holdings of the California courts (Br. 11). *Bank of America Nat. T. & S. Ass'n v. Board of Supervisors*, 93 Cal.App.2d 75, 208 P.2d 772 (2d Dist. Ct. of App. 1949), hearing denied by Sup. Ct. 1949; *Oakdale Irr. Dist. v. County of Cala-*

³ The relief sought was the issuance of a writ of Mandamus to compel the board of supervisors to cancel a tax assessment pursuant to 4986 and 4986.4, Revenue and Taxation Code.

veras, 133 Cal.App.2d 127, 283 P.2d 732 (3d Dist. Ct. of App. 1955), hearing denied by Sup. Ct. 1955. These cases show not only that the right of cancellation still exists but that a writ of mandate will issue to compel the cancellation in the appropriate circumstances.

Nor can there be any hesitation about the fact situation in this appeal being appropriate for cancellation of the tax. The remedy at law is clearly inadequate, as the landowner who must pay the tax can get no relief except upon application of the United States under Section 4986 and obviously the United States would have no standing to sue for recovery of a tax it did not pay. Further, we are concerned in this appeal with the substantive rights of the United States to have the uncollected taxes cancelled and not with the particular procedural remedy which may be used in a state court. The district court had adequate procedural authority under the Declaration of Taking Act, 40 U.S.C. sec. 258a "to make such orders in respect of * * * liens * * * taxes * * * and other charges * * * as shall be just and equitable." The district court granted relief by way of summary judgment under Rule 56, F.R.C.P., not the issuance of a writ of mandate. It is not strictly germane to this appeal, therefore, in what circumstances a writ of mandate would have been issued in California courts. (Cf. R. 59).

Appellants argue that Section 3804a of the Political Code was changed when it was codified as Section 4986 of the Revenue and Taxation Code by virtue of Section 16 of the Revenue and Taxation

Code. Section 16 provides, as an aid in construction, that “‘shall’ is mandatory and ‘may’ is permissive.” Thus, appellants say that the prior interpretation of “may” in Section 3804a as mandatory could not be extended to Section 4986 (Br. 11). Appellants’ argument ignores Section 2 of the Revenue and Taxation Code which provides:

The provisions of this code in so far as they are substantially the same as existing statutory provisions relating to the same subject matter shall be construed as restatements and continuations, and not as new enactments.

The Attorney General of California has noted that since Section 2 uses “shall” it is, under Section 16, mandatory and not merely permissive. The Attorney General concludes that “the word ‘may’ as used in Sections 4986 and 4986.2 of the Revenue and Taxation Code should be construed as being mandatory.” 2 Ops. Cal. Atty. Gen. 526, 528 (1943).⁴ 6 Ops. Cal. Atty. Gen. 72, 73 (1945). It should be interpolated that since 2 Ops. Cal. Atty. Gen. 526 was issued, Section 4986 has been amended three times, 1944, 1947 and 1955⁵ without any modification of the section which would indicate disagreement with the Attorney General’s interpretation.

Appellants place some reliance on the fact that the California courts in their interpretations of Sec-

⁴ The Court’s attention is invited to the exact date of this opinion, December 28, 1943, which is some four months later than the opinion set out in the appendix of appellants’ brief.

⁵ See West’s Annotated Cal. Codes, Sec. 4986, Revenue and Taxation Code for legislative history.

tion 4986 are dealing with state agencies which have no power to acquire title before final judgment, saying that the Declaration of Taking Act has no counterpart in state law (Br. 11-13). The relevance of this suggestion is rather difficult to ascertain. So far as is here concerned, the difference when a declaration of taking is used is simply one as to the point in the condemnation proceeding at which title is transferred. The question here, whether taxes, which at the time of that transfer have become a lien but which cannot then be paid because they have not yet been levied and their amount determined, are to be cancelled is unaffected. Moreover, the California legislature must have been aware of the right of the United States to take title before ascertainment of just compensation when it added "property acquired after the lien date by the United States" to those classes of property on which uncollected taxes could be cancelled. The Declaration of Taking Act, 40 U.S.C. 258a, was enacted by the Act of February 26, 1931, 46 Stat. 1421. The reference to property acquired by the United States was added to Section 4986 by the 1941 amendment as part of subsection (e). Stats. 1941, C. 448, p. 1739, Section 1. In 1944, the section was again amended by deleting the reference to property acquired by United States in subsection (e) and adding it in subsection (f) as it now exists. Stats. 3d Ex. Sess. 1944, C. 5, p. 31, Section 2 effective May 16, 1944. Thus when the legislature last dealt with property acquired by the United States, the Declaration of Taking Act had been in effect for thirteen years and

had been extensively used during the World War II period. It is inconceivable that the California legislature was not aware of the right of the United States to take title to condemned property before final payment or that it did not act in the light of this knowledge when enacting the 1941 and 1944 amendments of Section 4986. For example, in January 1941, a proceeding was filed to condemn 72 acres of land on the City of Oakland's waterfront and this Court, just one year later, issued its opinion explaining the nature of the Declaration of Taking procedure. *City of Oakland v. United States*, 124 F.2d 959 (C.A. 9, 1942), cert. den. 316 U.S. 679 (1942).

Appellants raise the question whether Section 4986(f) as interpreted by the district court is in violation of Article 4, Section 31 of the California Constitution (Br. 13). Article 4, Section 31 provides that the legislature shall not "have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; * * *." Appellants concede the cancellation of taxes on property acquired by a public body for public purposes does not offend the Section (Br. 13). Inasmuch as appellants' concession covers the facts of this appeal precisely it would appear no further argument is necessary. The appellants content however, that a cancellation *solely* for the benefit of private landowners is repugnant to the Constitutional provision. We will assume the correctness of their conclusion if their premise were correct, but obviously a cancellation under Section 4986(f) is not *solely* for the

benefit of the private landowners. As has been pointed out earlier in our argument (*supra*, pp. 6, 7), the primary purpose of the statute is to expedite settlement and reduce the cost of land acquired by the United States. Where the cancellation of taxes serves a public purpose, the mere fact that property owners incidentally benefit from the cancellation does not render the statute invalid under Article 4, Section 31 of the California Constitution, *San Bernadino County v. Way*, 18 Cal.2d 647, 652-653, 117 P.2d 354, 359 (1941); *City of Ojai v. Chaffee*, 60 Cal.App.2d 54, 58-61, 140 P.2d 116, 118-119 (2d Dist. Ct. of App. 1943), and cases there cited; see also *Allen v. Franchise Tax Board*, 236 P.2d 378, 380-381 (2d Dist. Ct. of App. 1951), affirmed 39 Cal.2d 109, 245 P.2d 297 (1952).

Appellants also controvert the authority of the district court to prohibit collection of the taxes from the landowners as a personal obligation under Section 3003 of the California Revenue and Taxation Code (Br. 14). The United States takes no position on appellants' contention that it is an open question in California whether a cause of action for taxes remains against the former owners personally after the land has become exempt. Nor is it necessary to consider that matter in order to uphold the judgment of the court below. Section 3003, upon which appellants base their argument, applies only to "delinquent taxes or assessments" (Br. 6). The district court proceeds under Section 4986 which provides for the *cancellation* of uncollected taxes. If the district court is correct, as we maintain, that

the United States is entitled to have the taxes cancelled the question of "delinquent taxes or assessments" could never arise. Certainly taxes cannot be "delinquent" prior to the time they are to be paid. Here they were payable on November 1, 1955, and January 20, 1956 and did not become delinquent until December 10, 1955, and April 20, 1956.⁶ But the United States acquired title on June 16, 1955, and applied for cancellation on November 4, 1955 (R. 26). Cancellation, which should have been allowed, should relate back at least to that date, hence there never were, here, "delinquent" taxes.

III

The Correct Interpretation Of Section 4986 Relieves The Landowners Of A Manifestly Unfair Tax Burden

Although it is not legally controlling, another reason for adopting the United States' interpretation of Section 4986 is that it is equitably superior to the interpretation urged by appellants. And since appellants' brief continues to touch upon these purely equitable considerations, it is appropriate for us to present a résumé of the equities. The United States has had possession of the property since 1953 under a taking for a term of years. When the fee simple was taken by the filing of the declaration of taking on June 16, 1955, the landowners' interest in the property was entirely terminated. *United States v. Carey*, 143 F.2d 445, 450 (C.A. 9, 1944); *United States v. Hayes*, 172 F.2d 677, 679 (C.A. 9, 1949);

⁶ See Sections 2605, 2606, 2617, 2618, Cal. Rev. & Tax. Code.

United States v. 44.00 Acres of Land, etc., 234 F.2d 410, 415 (C.A. 2, 1956), cert. den. 352 U.S. 916 (1956). The landowners became complete strangers to the land or what might happen to it thereafter. They were entitled to none of the income from the land, nor any appreciation in its value after that date.

The taxes which the appellants, City and County of San Diego, seek to collect are for the fiscal year beginning July 1, 1955, several days after the landowners' interest ceased. The appellants' contention that "The Government is further unsound and inaccurate in assuming that the taxes are imposed for a fiscal year" is wrong (Br. 15). One need look no further than the statute making taxes a lien to prove this. Section 2192 of the Cal. Rev. & Tax. Code states unequivocally that "All tax liens attach annually as of noon on the first Monday in March preceding *the fiscal year for which the taxes are levied.*" (Emphasis supplied). This obvious interpretation of Section 2192 is corroborated in the following excerpt from an explanation of the California tax system:

The general property tax attaches as a lien at noon of the first Monday in March immediately preceding the fiscal year for which the tax is levied. The fiscal year commences on July 1, and the tax is generally levied around September 1.

The California Tax System by J. Gould—
West's Annotated Cal. Codes—Revenue & Tax.
—Section 1-6000, p. 34, Vol. 59 (1956).

The conclusion is inescapable that the interpretation of the California Revenue & Taxation Code which the appellants urge upon this Court will result in the landowners being forced to pay taxes for a year during which they received no income from nor had any interest in the property and when the title, legal and equitable with the entire beneficial interest, was vested irrevocably in the United States. Insofar as taxes represented the payment for governmental services furnished to the land, the former owners received none of those benefits during the fiscal year for which appellants seek to make them pay.

The Court should not place this undeniably unfair burden on the landowners unless there is no alternative. Fortunately, there is a very sound alternative which can be recommended to the Court on both legal and equitable principles. That alternative is the interpretation of Section 4986 which the California courts have uniformly adopted, and which was adopted by the court below which is fully conversant with California law.

CONCLUSION

For the foregoing reasons it is submitted that the judgment of the district court is correct and should be affirmed.

Respectfully,

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

COUNTY OF SAN DIEGO AND THE
CITY OF SAN DIEGO,

v. *Appellants,*

UNITED STATES OF AMERICA,

Appellee.

CHARLES W. CARLSTROM, SOUTHERN
CALIFORNIA CHILDREN'S AID FOUNDA-
TION, INC., a corporation, SOUTHERN
CALIFORNIA DISTRICT COUNCIL OF
THE ASSEMBLIES OF GOD, INC., a cor-
poration, and THE SALVATION ARMY,

v. *Appellants,*

COUNTY OF SAN DIEGO,

Appellee.

**REPLY BRIEF FOR APPELLANTS
COUNTY OF SAN DIEGO AND
THE CITY OF SAN DIEGO**

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NO. 15352

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REPLY BRIEF FOR APPELLANTS
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Statement with Respect to Brief for
"Appellees" Charles W. Carlstrom et al

The record will show that the defendants Carlstrom et al moved to strike the answer of appellants County of San Diego and the City of San Diego. That motion was denied. (Memorandum of trial court, T. R., pp. 63 through 65, Judgment, p. 82 T. R.), and their appeal relates solely to that denial. Appellants Charles

the Government transcends constitutional limitations. Our only concession is that if the Board of Supervisors in its discretion grants a petition for cancellation with reference to property purchased by a public agency by negotiation and not by the exercise of eminent domain, the statute as construed by the California courts is constitutional. Beyond that point it is demonstrably violative both of due process and the prohibition against a gift of public property or public rights to a private party for a private purpose.

The United States, p. 11 of its brief, stated:

“The principal argument on which the appellants rely is that Section 4986(f) was not intended to apply to condemnation cases, but only purchases on the open market. Appellants cite absolutely no authority to sustain their conjecture.”

All of the cases cited by the United States compelling the cancellation relate to purchases and do not relate to condemnation proceedings. *People v. Board of Supervisors*, 126 C. A. 670, *City of Los Angeles v. Ford*, 12 Cal. 2d 407, *City of Los Angeles, v. Board of Supervisors*, 108 C. A. 655, all involve title acquired by purchase rather than condemnation. The United States has not cited a case where in a condemnation action the taxing agency was precluded from asserting in the court where the action was pending the validity of its tax lien. In the present case summary judgment was granted not on the basis of any claim of irregularity or invalidity of the tax lien, but instead solely on the basis of the Government's alleged arbitrary right of cancellation.

Argument in Reply to United States

A. *Government's "Mandatory" Theory of Cancellation Repudiated by the Statute Itself.*

With respect to the "mandatory vs. discretionary" aspect of the power of cancellation and the Government's resultant arbitrary rights in relation thereto, all as alleged and asserted by it, the expressed policy of the California legislature itself is to be found in Section 4986, paragraph (g), particularly in the final subparagraph thereof, reading as follows:

"(g) On personal property or improvements assessed as a lien against real property acquired after the lien date by the United States of America, the State or by any county, city, school district or other political subdivision which because of this public ownership is not subject to sale for delinquent taxes.

" 'Property acquired' as used in this section shall include street easements and shall also include other easements for public use where the residual estate remaining in private ownership has a nominal value only.

"No cancellation under subparagraphs (b), (e), (f), or (g) of this section shall be made in respect of all or any portion of any tax, or penalties or costs attached thereto, collectible by county officers on behalf of a municipal corporation without the written consent of the city attorney thereof.

"No cancellation under subparagraph (g) shall be made in respect of all or any portion of any tax, or penalties or costs attached thereto, until after three years succeeding the lien date of such tax on personal property or improvements and then only if in the opinion of the county auditor and the board of supervisors the remaining real property under the assessment is not of sufficient value to secure payment of the taxes on such personal property or improvements." (Emphasis ours).

From this it will be noted (again directing attention to the final subparagraph above set forth with emphasis) that: (1) No cancellations shall be made at all, i.e., cancellations are positively prohibited, as to secured personal and improvements taxes less than 3 years old (computing time from lien date to time of filing

petition for cancellation); and (2) as to such improvements and personal taxes over 3 years old, cancellations are permitted only if the county auditor and the board of supervisors in the exercise of their judgment and discretion shall agree that the remaining real property under assessment is *not* sufficient in value to secure payment of such taxes.

If and when the tax on the land alone is canceled in the discretion of the county, pursuant to the section, then these uncancellable taxes on personal and improvements heretofore secured against the land, if they are less than 3 years old or if they are more than 3 years old but are nevertheless deemed uncancellable by the county taxing officials, are transferred to the unsecured roll, where they become the subject of collection by suit brought by the county, all as set forth in the following Revenue and Taxation Code sections:

“§ 134. *‘Unsecured property.’* ‘Unsecured property’ is property: (a) The taxes on which are not a lien on real property sufficient, in the opinion of the assessor, to secure payment of the taxes.

(b) The taxes on which were secured by real estate on the lien date and which real estate was later acquired by the United States of America, the State, or by any county, city, school district or other political subdivision and the taxes canceled thereon within three years from the lien date thereof.”

“§ 2921.5. *Transfer of taxes from secured to unsecured roll: Collection.* Taxes on unsecured property as defined in Section 134, subparagraph (b) of this code shall be transferred from the ‘secured roll’ to the ‘unsecured roll’ of the corresponding year by the county auditor at the same time the taxes are canceled on the real estate, and shall be collected in the same manner as other delinquent taxes on the ‘unsecured roll’; provided, that no delinquent penalty shall attach to such taxes so transferred, except to those taxes which carried delinquent penalty on the secured roll at time the real estate involved was acquired by a political subdi-

vision.”

“§ 3002. *Suit to collect from assessee moved to another county: Employment of attorney: Officer's liability to continue.* If an assessee of property on the unsecured roll moves to another county, the official collecting taxes on the unsecured roll in the county in which the property was assessed may employ an attorney to sue for and collect the taxes in such official's name. This does not relieve such official from any duties.”

“§ 3003. *Suit for collection where lien insufficient security.* Where delinquent taxes or assessments are not a lien on real property sufficient, in the judgment of the assessor or the board of supervisors, to secure the payment of the taxes or assessments, the county may sue in its own name for the recovery of the delinquent taxes or assessments, with penalties and costs.”

“§ 3004. *Evidentiary effect of certified copy of entry.* In any suit for taxes the roll, or a duly certified copy of any entry, showing the assessee, the property, and unpaid taxes or assessments, is prima facie evidence of the plaintiff's right to recover.”

“§ 3005. *Costs of service of summons: Inclusion in judgment: Deposit.* When a civil action is brought by the assessor or tax collector to recover delinquent unsecured property taxes, the sheriff, marshal, or constable shall specify, when the summons or process is returned, the costs which he would ordinarily be entitled to for such service and such costs shall be made a part of any judgment recovered by the assessor or tax collector and on payment or satisfaction of the judgment such costs shall be deposited in the county general fund.”

Thus it will be seen that the legislature itself has qualified and circumscribed its statutorily conferred right to provide that there shall be no cancellations whatever for two out of the three types of taxes on the secured roll under certain conditions, but permits such cancellations under certain other conditions, all subject, however, to the judgment and discretion of the county taxing officials.

What becomes of the Government's theory of “mandatory”

cancellation under such circumstances? Unless it be that Government's theory is now relegated in its application to the third remaining type of tax on the secured roll, namely, the tax on the land alone.

As to the latter, it is submitted the more recent California cases, heretofore cited, dispose of the point. No longer is it mandatory, say these decisions, that the tax on the land, or the improvements, or the personal property secured against that land, be canceled simply because acquired after lien date by Government. Discretion is now vested in the county in these premises, for to cancel on the land might jeopardize in the individual case improvements and personal property taxes already secured against that land.

For example, if such taxes are less than 3 years old they can be transferred to the unsecured roll and be collected by suit, as heretofore explained. But if they are over 3 years old such transfer is of no avail to the county for the 3-year statute of limitations (Section 338, subparagraph (1), Code of Civil Procedure) runs against the county on such collection suit. (See *Los Angeles County v. Continental Corp.*, 113 Cal. App. 2d 207). In the latter case, the tax over 3 years old, the county has not exchanged or substituted remedies for the collection of its uncancellable improvements and personal taxes as in the former case, but has lost and foregone the only remedy it had, namely, its lien on the land. Hence the discretion now conferred to cancel or not to cancel in the individual case.

The facts in the instant case fit the foregoing legal principles. The lien date of the taxes here involved was Monday, March 7, 1955. Government acquired the property the following June 16, 1955. Less than 3 years after March 7, 1955, to wit, on November 4, 1955, Government petitioned the County for cancellation and was denied on January 10, 1956. Of the total sum of

194,517.02
~~\$334,912.62~~ in taxes sought to be canceled, the amounts of taxes on land and improvements respectively, as revealed by the account numbers set forth in the County's Supplemental Answer, are as follows (there were no personal property taxes secured against the land): Land ~~\$53,414.27~~; Improvements ~~\$281,498.44~~.

From the above and foregoing it clearly appears, therefore, that of this total sum of \$334,912.62, the sum of \$281,498.44 in improvements taxes was not cancellable at all under express provisions of the statute, such taxes being less than 3 years old. And as to the remainder, or \$53,414.27, assessed against the land, the County exercised its discretion and elected not to destroy its security for those uncancellable improvements taxes by removing entirely its land tax lien, but in the words of the statute chose rather to keep "the remaining real property under the assessment . . . of sufficient value to secure payment of the taxes on such . . . improvements," and not to resort to its alternative remedy of transfer to unsecured roll and collection by suit, all as it had the clear statutory right to do.

On this point alone the trial court's judgment cancelling all of the taxes and enjoining their collection, is palpably erroneous and in violation of the law, certainly to the extent at least of some \$281,498.44 improvements taxes which are secured against the land.

It must be borne in mind that subdivision (g) of the section, particularly the final paragraph thereof, is the later amendment to the section in point of time, it having been added in 1947 (see Stats. 1947, p. 2023), as compared with subdivision (f) with its reference to the United States, which was first added in 1941 (Stats. 1941, p. 2641) and re-cast as it now appears in 1945 (Stats. 1945, 3d Extra Session 1944, p. 31, in effect May 1, 1944). And the cases upon which appellants rely, namely, *Sherman v. Quinn* (1948), 31 Cal. 2d 661, *Vista Irr. Dist. v. Bd. of Super-*

visors (1948), 32 Cal. 2d 477, and *Security First National Bank v. Bd. of Supervisors* (1950), 35 Cal. 2d 323, were all decided after this 1947 addition of subdivision (g).

B. *Injunction Erroneously Granted by Court Below.*

The Government attempts to distinguish *Weston Investment Co. v. State of California*, 31 Cal. 2d 390, and Revenue and Taxation Code, Section 3003 on the ground that cancellation was claimed before delinquency. The answer to that argument is that the tax is now delinquent and that it has not been paid. It may be true that the County in seeking to avoid harsh treatment of its citizens has not claimed by its answer the delinquent penalties which accrued in December, 1955 and April, 1956 to the unpaid 1955 taxes. The County has consistently accepted the position suggested to it by the United States and other agencies exercising the power of eminent domain, that rights are frozen as of the date of a declaration of taking or order of immediate possession. The fact that delinquency penalties have not been computed and added to the amount claimed in the answer does not alter the circumstance that the taxes are delinquent and that the California Supreme Court has held in the *Weston* case, a case where the property had been taken by the United States by eminent domain, that it remains an open question, unresolved by the California courts, whether an action to collect such taxes as an unsecured debt will lie. The court below has issued an injunction against such collection, an action in which the United States has no interest or concern, and which has no support in the statutes and decisions of the State of California.

C. *Discussion of California Constitution, Article IV, Section 31.*

With respect to the impact of the California Constitution, Article IV, Section 31, the United States has called attention to the case of *City of Ojai v. Chaffee*, 60 C. A. 2d 54.

A very recent case, *Doctors General Hospital of San Jose v. The County of Santa Clara*, 150 A. C. A. 52, at p. 56 summarizes the Ojai case, as follows:

"In *City of Ojai v. Chaffee*, 60 Cal. App. 2d 54 [140 P. 2d 116], the court held that a statute providing for the cancellation of uncollected taxes was not in contravention of article IV, section 31 of the Constitution, because the specific public purpose was to restore the property in question to the tax rolls and make it once more a source of public revenue."

The Doctors Hospital case contains also the following informative discussion of the constitutional provision:

"In *Estate of Stanford*, 126 Cal. 112 [54 P. 259, 58 P. 462, 45 L. R. A. 788], it was held that a retroactive release by the Legislature of the collateral inheritance tax was a void gift of public funds within the meaning of article IV, section 31, as the tax was due and payable at the death of the decedent which occurred prior to the legislative enactment. The case does not, as appellant maintains, stand for the proposition that vesting does not occur until the tax becomes due and payable. In dealing with a retroactive amendment in legislation concerned with other types of taxes, the reasoning of the Stanford case has been followed by the courts. In *People v. Schmidt*, 48 Cal. App. 2d 255 [119 P. 2d 766], it was held that the repeal of a provision of the Alcoholic Beverage Control Act could not affect the right of the people to collect the fee, as the right to collect had vested under the act before the repeal.

"*Estate of Potter*, 188 Cal. 55 [204 P. 826], held that the right to the inheritance tax vested in the state at the date of the taxable transfer even though it was not due and payable until the death of the decedent. As stated by the court in *Trippet v. State*, 149 Cal. 521 at page 529 [86 P. 1084, 8 L. R. A. N. S. 1210], 'There is no legal inconsistency in the idea of a right being vested, although the possession may be postponed or contingent upon the performance of certain acts.'

"In *City of Santa Monica v. Los Angeles County*, 15

Cal App. 710 [115 P. 945], the court held that property acquired by the city after the lien date but prior to the levy and assessment was not exempt from taxation as the lien attached on the first Monday in March. The court stated at page 712 that 'a lien declared by positive statute is not dependent for its existence upon subsequent acts requisite to its enforcement.'

"In *San Diego County v. Riverside County*, 125 Cal. 495 [58 P. 81], the court held that although the right of San Diego to the payment of certain taxes assessed on railroad tracks, did not accrue until a valid assessment had been made, the right to taxes arose on the lien date, and was one of the assets of San Diego County to be prorated between San Diego County and the newly created County of Riverside. The court said at page 500: 'The lien for the taxes justly leviable upon the property of a railroad company attaches on the first Monday of March in each year, and the obligation to pay necessarily accrues at the same time, if not earlier. Payment is not due, of course, until the assessment has been made; but when that has been done and the amount of taxes ascertained, it is payable to the county in which the roadbed was included at the time when the lien attached.' Furthermore the legislative history of the 1953 statute reveals that the section providing for retroactive application was added by amendment (1953 Assembly Journal p. 1932). The assumption of the Legislature appears to have been that the property tax vests as of the March 1 lien date.

"It should be noted that the 1954 Amendment (Stats. 1955, ch. 107) to Article XIII, section 1c of the State Constitution, which was designed to liberalize the welfare exemption, is made applicable to buildings and equipment in the course of construction on or after March 1, 1954.

"The appellant further contends that even if the right to tax moneys vested on March 1 and constituted a thing of value within the purview of section 31 of article IV of the state Constitution, the Legislature could make a valid gift thereof under the public doctrine of section 1c, article XIII of the state Constitution. It is a well recognized rule that the courts will not disturb a legislative determination of what constitutes a public purpose, as long as it has reasonable basis. (*Alameda County v. Janssen*, 16 Cal. 2d 276 [106 P. 2d 11, 130 A. L. R. 1141]; *Shean v. Edmonds*, 89

Cal. App. 2d 315 [200 P. 2d 879]; *County of Los Angeles v. Jessup*, 11 Cal. 2d 273 [78 P. 2d 1131].) However, in the 1953 amendment there is no statement indicative of purpose, unless the urgency clause is so construed. There is no doubt that the provision for hospitals is a well recognized public purpose. However, it has been held that a county cannot provide medical treatment and care to those who can obtain and pay for such services at private hospital institutions. (*Goodall v. Brite*, 11 Cal. App. 2d 540 [54 P. 2d 5101].) Under the 1953 amendment the 10 per cent excess of profits over operating costs can be spent for any hospital purpose. The money could be used to provide more luxurious care in the existing facilities. Under the appellant's argument any hospital purpose is a sufficient public purpose for an appropriation of public funds. It is our view that private hospitals are exempt from taxation not because there is a public purpose within the meaning of article IV, section 31, but rather because the Legislature's power to exempt is limited to specific instances.

"In *City of Ojai v. Chaffee*, 60 Cal. App. 2d 54 [140 P. 2d 116], the court held that a statute providing for the cancellation of uncollected taxes was not in contravention of article IV, section 31 of the Constitution, because the specific public purpose was to restore the property in question to the tax rolls and make it once more a source of public revenue. In *Simpson v. City of Los Angeles*, 40 Cal. 2d 271 [253 P. 2d 464], the court upheld the surrender of unclaimed animals in the pound to private research laboratories for the specific public purpose of 'increasing knowledge relating to the cure of disease.' In *City of Oakland v. Garrison* (1924), 194 Cal. 298 [228 P. 433] the funds were required to be used for the paving of a certain road in the city of Oakland. Under the 1953 amendment there is no legally enforceable duty to use the 10 per cent excess profits for any specific hospital purpose. It is not enough that appellant intends to use the profits for a hospital purpose. *Cedars of Lebanon Hospital v. County of Los Angeles*, 35 Cal. 2d 729 [221 P. 2d 31, 15 A. L. R. 2d 1045], involved the application of the welfare exemption to various items of hospital property. In holding that the buildings under construction on tax date intended for use in housing of student nurses were not within the welfare exemption, the court

said at p. 742, 'as above quoted, the pertinent constitutional provision (art. XIII, § 1c) and the implementing statute (Rev. & Tax. Code, § 214) unequivocally require that the property be used for the enumerated purposes. Such express limitation making *use* the focal point of consideration contemplates actual use as differentiated from an *intention* to use the property in a designated manner.' "

The Ojai case also lends support to the right of the board of supervisors to refuse cancellation in a proper case. At page 63 the court says:

"The amicus curiae, appearing in behalf of the respondent, argues that section 4986.3 is not mandatory and hence no enforceable duty rests on respondent, basing this contention on the use of the word 'may' in the section and the definition of this word elsewhere in the Revenue and Taxation Code as being permissive. But, accepting and applying this definition, we think the discretion given thereby is vested solely in the board of supervisors, who may order the cancellation, and in the district attorney, whose consent thereto is necessary. The auditor is a mere ministerial officer, in this matter, and was doubtless specified as the officer to make the cancellation because the assessment roll is in his possession after taxes have become delinquent. (Rev. & Tax. Code, secs. 2622, 2623, 2625-2627.) When such cancellation has been properly ordered and consented to, the duty to make it rests on the auditor."

It therefore appears that while an auditor may not refuse cancellation when it has been ordered by the board of supervisors and the district attorney, there appears to be considerable support in the opinion for the position that the United States may not compel a cancellation for the sole benefit of private taxpayers and thereby make a gift of the money on deposit in the condemnation case in contravention both of the California and United States Constitutions.

It is not sufficient to avoid unconstitutionality that the gift

be to a public body and for a public purpose; it must likewise be of benefit to the county, as said in *City of Oakland v. Garrison*, 194 Cal. 298 at 302:

"[1] In other decisions, both prior and subsequent to the Conlin case, supra, this court has pointed out that where the question arises as to whether or not a proposed application of public funds is to be deemed a gift within the meaning of that term as used in the constitution, the primary and fundamental subject of inquiry is as to whether the money is to be used for a public purpose. If it is for a public purpose within the jurisdiction of the appropriating board or body, it is not, generally speaking, to be regarded as a gift. The case of *Sinton v. Ashbury*, 41 Cal. 525, involved the validity of an act of the legislature directing the auditor of the city and county of San Francisco to draw his warrant against the general fund in the treasury of the city for the payment to certain commissioners of compensation for preliminary work performed by them incident to the opening and extension of certain streets within the city. This court having first determined that the legislature had power to direct and control the affairs and property of a municipal corporation for municipal purposes, then said: 'It remains only to inquire whether the appropriation in this case was for a municipal or for a purely private purpose.' The court then pointed out that the opening and extension of a principal street through a city was a matter of concern to the people of the entire municipality and concluded that the act in question was clearly valid. In *Conlin v. Board of Supervisors*, 114 Cal. 404 [33 L. R. A. 752, 46 Pac. 279], the first Conlin case, supra, was reviewed and construed as holding that 'the legislature holds the public moneys in trust for public purposes, and under this limitation of the constitution can make no disposal of these funds except in accordance with such purposes,' and it was further pointed out that 'even if it be conceded that the legislature has any control over municipal funds, the only circumstances under which it could direct their payment would be for some municipal purpose, or in satisfaction of some valid claim against a municipality.' In *Veterans' Welfare Board v. Riley*, 188 Cal. 607 [206 Pac. 631], it was said that 'The fundamental

question involved . . . is the question as to whether or not such moneys are expended for a public purpose.' A like conclusion was reached and expressed in varying terms in *Ingram v. Colgan*, 106 Cal. 113 [46 Am. St. Rep. 221, 28 L. R. A. 187, 38 Pac. 315, 39 Pac. 437] (payment of bounties for the destruction of coyotes); *O'Dea v. Cook*, 176 Cal. 659 [169 Pac. 366] (payment of police pensions); *Macmillan Company v. Clark*, 184 Cal. 491 [17 A. L. R. 288, 194 Pac. 1030] (furnishing free text-books), and *Allied Architects' Assn. v. Payne*, 192 Cal. 431 [221 Pac. 209] (expenditure for a memorial hall for the use of veteran soldiers and sailors). [2] It cannot be doubted that the proper improvement of a public street is a public purpose, and in the light of the foregoing decisions we have no difficulty in arriving at the conclusion that the appropriation here in question is not to be regarded as a gift in the sense that it is to be devoted to a private purpose as distinguished from a public one.

"[3] But this conclusion does not entirely dispose of the question raised by respondent's first contention. Section 31 of article IV of the constitution provides in effect that the legislature shall have no power to authorize the making of any gift of any public money to any *municipal corporation*. It may reasonably be concluded, and we shall assume for the purposes hereof, that this provision would prevent the appropriation of county funds to a municipal corporation even for a public purpose, if that purpose were purely municipal and of no interest or benefit to the county as a political subdivision. As was said in the second Conlin case, *supra*, 'While the funds in a municipal treasury are in a certain sense public, they are so only for the limited public which has contributed them . . .'. It is not sufficient, therefore, that the appropriation here in question be for a public purpose. It must also be for a purpose which is of interest and benefit generally to the people of the county of Alameda. The question, then, is whether the improvement of this particular street within the City of Oakland is a matter of such general county interest that the county funds may properly be expended therein."

D. Discussion of Vista Irrigation Decision.

The United States, in its discussion of *Sherman v. Quinn* and

Vista Irrigation District v. Board of Supervisors at pages 12 to 14 of its brief, overlooks the following sequence of events: *Sherman v. Quinn*, 31 Cal. 2d 661, was decided April 3, 1948. It holds that a veteran claiming exemption is not entitled to mandamus to compel cancellation but instead must pay his taxes under protest and sue to recover, which is an adequate remedy at law. Companion cases decided the same day include *Eisley v. Mohan*, 31 Cal. 2d 637, which denies mandate to compel the assessor to assess to the veteran only his possessory interest in real property purchased from the Veterans' Welfare Board. The holding is that the veteran is the owner, and that the vendor, Veterans' Welfare Board, retains its legal title as a mere security. Another case decided the same day, *Dept. of Veterans Affairs v. Board of Supervisors*, 31 Cal. 2d 657, denies cancellation to the department, emphasizes at page 659 the discretionary right to refuse cancellation granted to the board of supervisors by Revenue and Taxation Code, Section 4986.4. The court also cites *La Mesa etc. Irr. Dist. v. Hornbeck*, 216 Cal. 730 on the point that cancellation is available only where property is impressed with a public use.

All of the cases decided on that day are directed to the proposition that under the program for the purchase of housing for veterans, the veteran becomes the owner and is assessable as such even though a security legal title is retained by the Veterans' Welfare Board.

It was not until the following year, in *Vista Irrigation District v. Board of Supervisors*, 32 Cal. 2d 477, that the decision was made that an irrigation district, which is a public agency, could not compel cancellation by mandamus proceedings but instead was limited to the remedy of payment under protest and suit to recover. The 1948 decisions dealt with private parties. The 1949 decision applies the principles of *Sherman v. Quinn* to a petition filed by a governmental public agency. That such is

the character of an irrigation district, see *Anderson-Cottonwood Irrigation District v. Klukkert*, 13 Cal. 2d 191.

The two later cases cited by the United States, *Bank of America Nat. T. & S. Ass'n. v. Board of Supervisors*, 93 Cal. App. 2d 75, and *Oakdale Irr. Dist. v. County of Calaveras*, 133 Cal. App. 2d 127 are distinguishable as follows:

1. Decisions of the District Court of Appeal are of less authority than decisions of the Supreme Court.

2. The two later cases involved taxes which were void at all stages. They did not deal with taxes valid when imposed subject to later cancellation. They do not weaken the proposition that *Sherman v. Quinn* cited by the Supreme Court as controlling in *Vista Irrigation District v. Board of Supervisors* makes it the present law of California that an official agency of the State or other public agency listed in Section 4986 no longer has a right to compel cancellation of a valid tax by writ of mandate.

E. Basic Equities Are with the City and County Against the Government.

The United States concludes its brief by an attempted appeal to the equities alleged to favor the taxpayer. This argument assumes that there is something wrong in a tax system which measures the incidence of a tax as of a fixed time, noon of the first Monday in March, rather than by proration.

In the appendix to appellants' opening brief cases are cited showing that the law of California imposes local property taxes on the basis of ownership on the first Monday in March rather than for or relating to the fiscal year. These cases include *San Gabriel Valley Land and Water Co. v. Witmer Bros. Co.*, 96 Cal. 623, *County of San Diego v. County of Riverside*, 125 Cal. 495, *Rode v. Siebe*, 119 Cal. 518, *Grant v. Cornell*, 147 Cal. 565, *State v. Royal Consolidated Mining Co.*, 187 Cal. 343, *Bakersfield and Fresno Oil Co. v. Kern County*, 144 Cal. 148, *Mohawk Oil Co. v.*

Hopkins, 196 Cal. 148, *Weber v. County of Santa Barbara*, 15 Cal. 2d 82, *Dawson v. County of Los Angeles*, 15 Cal. 2d 77.

It may be noted in passing that there is a well established custom in the sale of real estate in California whereby the purchaser ordinarily agrees by contract to prorate the taxes and to assume that proportion of the tax which relates to the part of the fiscal year remaining after recordation of his deed. In the absence of such an agreement, however, the burden and obligation of paying a tax which has become a lien at the date of recordation rests with the grantor of a grant deed, (*California Civil Code*, Section 1113; *McPike v. Heaton*, 131 Cal. 109; *Estate of Backesto*, 63 Cal. App. 265; *Crim v. Umbesen*, 155 Cal. 697; *Wilcox v. Latin*, 93 Cal. 588; *Grant v. Beronio*, 97 Cal. 498), or with a vendor who has obligated himself to convey a good title. (*Miller & Lux v. Sparkman*, 128 Cal. App. 449; *Parr-Richmond Industrial Corp. v. Boyd*, 43 Cal. 2d 157.)

With respect to payment of taxes from condemnation awards only a weak minority position suggests the propriety of either prorating or cancelling taxes which have become a valid lien. Some of these cases are referred to at page v in the Attorney General's Opinion appended to the opening brief. A few additional cases are found at 45 A. L. R. 2d 544. One of the cases in which prorating was practiced, namely, *United States v. Certain Lands*, 29 F. Supp. 92, was reversed on appeal (*Collector v. Ford Motor Co.*, 158 F. 2d 354), and the full amount of the tax ordered to be paid.

Real property taxation in California is predicated upon the duty of the assessor to ascertain the value of all property as of 12 o'clock noon on the first Monday in March. This valuation is subject to equalization by the board of supervisors sitting as a board of equalization. The amount of money necessary to be raised by taxation is determined by the board, budgetary require-

ments are fixed, and the tax is imposed. The amount of taxes levied is measured by the value as ascertained for the lien date. If the Federal Government removes from the rolls half the area of the county, there would result an irreparable deficit. The tax base is property existing on the first Monday of March, not property continuing to exist to the end of the fiscal year.

If a natural calamity such as the Long Beach earthquake of 1933 strikes a community, the only way of avoiding the tax obligation as to destroyed improvements is by constitutional amendment, as was done by California Constitution Article XIII, Section 8a. No constitutional relief has been afforded in California to the taxpayer against the comparable hazard of an eminent domain proceeding in Federal courts.

Additional authorities on the point that taxes are payable in full from condemnation awards without proration or recognizing the full and immediate impact of a legal property tax lien even though the amount of the tax may be later ascertained are the following:

U. S. v. 150.29 Acres, 135 F. 2d 878

People v. Palo Seco Fruit Co., 136 F. 2d 886

Cases demonstrating the tax obligation of the owner on the lien date include:

Helvering v. Missouri State Life, 78 F. 2d 778

Merchants' Bank v. Helvering, 84 F. 2d 478

U. S. v. Consolidated Elevator Co., 141 F. 2d 791

Magruder v. Suppler, 316 U. S. 394.

Additional authorities establishing that the lien is transferred from the land itself to the money deposited in the registry of the court are the following:

Duckett & Co. v. U. S., 266 U. S. 149
Collector v. Ford, 158 F. 2d 354
Washington Water Power Co. v. U. S., 138 F. 2d 541
U. S. v. 150.29 Acres, 135 F. 2d 878.

*F. Unsettled Interpretations of California Statutes Should
Be Clarified in California Courts.*

If there should be any doubt remaining in the minds of the reviewing court concerning the law of California with respect to tax obligations and with respect to the equity of enforcing the California tax, or with respect to the discretion of the board of supervisors to grant or deny an application for cancellation, it is respectfully urged that this court follow the precedent set by the court in *U. S. v. 150.29 Acres*, 135 F. 2d 878, where the U. S. Court, not sufficiently advised as to the law of Wisconsin, reversed the District Court and directed that proceedings therein be stayed and suspended until the United States or the other litigants should bring and prosecute to judgment appropriate proceedings in the State Court. This would insure an authoritative interpretation of the California statutes by the California courts. Cases cited by the Circuit Court of the Seventh Circuit in support of such disposition were:

City of Chicago v. Fieldcrest Dairies, 316 U. S. 168
Railroad Commission v. Pullman, 312 U. S. 496
Green v. Phillips Petroleum Co., 119 F. 2d 466.

The opinion concludes:

“This course is clearly indicated because the controversy is in its last analysis one between a taxpayer and a taxing unit of Wisconsin. It is a Wisconsin question, of primary interest to Wisconsin and its taxpayers.”

Conclusion

These appellants therefore respectfully urge in conclusion:

1. That the cross appeals of Charles W. Carlstrom, Southern California Children's Aid Foundation, Inc., Southern California District Council of the Assemblies of God, Inc., and The Salvation Army are apparently abandoned and should be ordered dismissed.

2. That none of the parties has made any attempt to support the validity of Section 1252.1 of the California Code of Civil Procedure and that that part of the judgment denying the motion to strike should be affirmed.

3. That the relief granted the United States can in no event include cancellation of any portion of the taxes, and certainly not, at the very least, the \$281,498.44 improvements taxes secured against the land.

4. That the United States has no interest in the money on deposit with the court and these appellants should be permitted to assert their normal rights with respect to the liens which have been transferred from the land to the deposit.

5. That with respect to the tax obligation (a) the tax should be ordered paid out of the deposit or (b) the judgment should be reversed and the parties should be instructed to seek clarification in the State courts.

6. That the County and the City should be permitted to assert without Federal impairment their rights against the money on deposit in the registry and against the taxpayers personally.

Respectfully submitted,

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The City of San Diego



No. 15352

United States
Court of Appeals
for the Ninth Circuit

COUNTY OF SAN DIEGO and CITY OF SAN
DIEGO, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

CHARLES W. CARLSTROM, SOUTHERN
CALIFORNIA CHILDREN'S AID FOUN-
DATION, INC., a corporation, SOUTHERN
CALIFORNIA DISTRICT COUNCIL OF
THE ASSEMBLIES OF GOD, INC., a cor-
poration and THE SALVATION ARMY,
Appellants,

vs.

COUNTY OF SAN DIEGO, Appellee.

Transcript of Record

Appeals from the United States District Court for the
Southern District of California,
Southern Division

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Court of Appeals
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vs.

UNITED STATES OF AMERICA, Appellee.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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* Page numbers appearing at foot of page of original Transcript of Record.

United States District Court, Southern District
of California, Southern Division

Civil No. 1506-SD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

70.39 ACRES OF LAND, MORE OR LESS, in
San Diego County, State of California; GRE-
GORY ELECTRIC COMPANY, an Illinois
Corporation, et al., Defendants.

FIRST AMENDED COMPLAINT
IN CONDEMNATION

1. Now comes the plaintiff, United States of America, by Laughlin E. Waters, United States Attorney, Joseph F. McPherson and George F. Hurley, Assistant United States Attorneys, and files this, its first amended complaint in condemnation.

2. This is an action of a civil nature brought by the United States of America at the request of James H. Douglas, Under Secretary of the Air Force, by direction of the Secretary of the Air Force, and of the Attorney General of the United States of America, for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

3. The authority for the taking is the Act of

Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a) and acts supplementary thereto and amendatory thereof, and [2] under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257); the Act of Congress approved August 18, 1890 (26 Stat. 316) as amended by Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518, 50 U.S.C. 171), which acts authorize the acquisition of land for Military purposes; the Act of Congress approved August 12, 1935 (49 Stat. 610, 611; 10 U.S.C. 1343a, b and c), which act authorized the acquisition of land for Air Force Stations and Depots; the National Security Act of 1947 approved July 26, 1947 (61 Stat. 495); the Act of Congress approved July 10, 1952 (Public Law 488, 82nd Congress) and the Act of Congress approved June 30, 1954 (Public Law 458, 83rd Congress), which said acts authorize acquisition of the land and appropriated funds for such purposes.

4. The use for which the property is to be taken is to provide for the defense of the United States of America and for the military purposes of the Department of the Air Force in connection with Plancor No. 20, in San Diego County, State of California, and for such other uses as may be authorized by Congress or by Executive Order, and said land has been selected under the direction of the Secretary of the Air Force for acquisition by the United States of America for the uses and purposes aforesaid.

5. The estates in the property to be acquired for said public uses, identified in paragraph 6 and described in Exhibits "A" and "B" following, are as follows:

(a) The right of exclusive use and occupancy for a term of years commencing May 1, 1953 and ending with the filing of this first amended complaint in condemnation and the declaration of taking referred to in paragraph 12 following, subject, however, to existing easements for public roads [3] and highways, public utilities, railroads, and pipe lines, and to such rights and reservations as are set out in said Exhibit "A".

(b) Upon the conclusion of the exclusive use and occupancy described in sub-paragraph (a) above, the estate taken is the fee simple title, subject to existing easements for public roads and highways, for public utilities, for railroads and pipe lines.

6. (a) The properties taken by this action for the use and occupancy described in sub-paragraph (a) of paragraph 5 above are segregated into separate parcels designated by separate parcel numbers and in such manner are more particularly described in Exhibit "A" hereto attached and by this reference made a part hereof.

(b) The properties taken in fee simple, described in subparagraph (b) of paragraph 5 above, are likewise, for convenience, segregated into parcels, designated by separate parcel numbers, and in such

manner are more particularly described in Exhibit "B" hereto attached.

7. The persons known to plaintiff to have or to claim interests in the properties described in Exhibit "A" are named in Plaintiff's Statement of Apparent Interest of Defendants at the end of Exhibit "A".

8. The persons known to plaintiff to have or to claim interests in the properties described in Exhibit "B" are named in said exhibit immediately following the legal description of each such parcel.

9. The City of San Diego, County of San Diego, and State of California may have or claim interests in the property identified in paragraphs 5 and 6 above, by reason of taxes and assessments due and recoverable, and for other governmental charges levied or assessed pursuant to law, [4] and said public bodies are made defendants to this action.

10. In addition to the persons named herein, there are or may be others who have or may claim to have some interests in the properties taken and whose names are unknown to plaintiff and such persons are made parties to this action under the designation, "Unknown Owners", and the provisions of this paragraph 10 apply to the real estate described in Exhibits "A" and "B" following.

11. That, on April 29, 1953, plaintiff filed its original declaration of taking and, thereafter, on July 30, 1954, filed its supplemental declaration of

taking, of the estates and interests described in sub-paragraph (a) of paragraph 5, above, and deposited into the registry of the court the sums of money identified in said declaration of taking and supplemental declaration of taking as the estimated just compensation for the condemnation and taking by the plaintiff of the exclusive use and occupancy of the properties therein described, commencing May 1, 1953 and terminating June 30, 1955. The right of exclusive possession is and has been continuously vested in the United States during said period to the date hereof, though actual possession of portion of properties has been deferred. Immediate possession of all the properties condemned is now required.

12. Simultaneously, with the filing of this first amended complaint in condemnation, the United States of America has filed its declaration of taking, dated June 1, 1955, and executed by James H. Douglas, Under Secretary of the Air Force, by the direction of the Secretary of the Air Force of the fee simple estate, subject to existing easements for public roads and highways, for public utilities, for railroads and pipe lines in the properties described in said declaration of taking and in Exhibit "B" hereto attached, [5] and in conjunction therewith has deposited into the registry of this court the sum of \$2,600,000.00, which is estimated by the Secretary of the Air Force on behalf of plaintiff to be the just compensation to be paid for the condemnation of the properties described in Exhibit

“B” hereof, for the estate described in this first amended complaint in condemnation and in the declaration of taking, and the Secretary of the Air Force, acting by and through the Under Secretary thereof, has stated that he is of the opinion that the estimated award for said properties probably will be within any limits prescribed by law on the price to be paid therefor.

Wherefore, plaintiff requests that just compensation for the taking of the interests and estates hereinabove described in the properties described in Exhibits “A” and “B”, be ascertained and awarded; that the Court enter an order confirming the right of exclusive possession of the properties in the United States of America in accordance with the taking of the fee estate therein subsequent to the date of filing this first amended complaint in condemnation and the declaration of taking, and for such other and further relief as may be meet and proper in the premises.

Dated June 15, 1955.

UNITED STATES OF AMERICA,
By LAUGHLIN E. WATERS,

United States Attorney,
JOSEPH F. McPHERSON,
GEORGE F. HURLEY,

Assistant United States Attorneys,

/s/ By GEORGE F. HURLEY,
Its Attorneys. [6]

Plaintiff demands a trial by jury.

UNITED STATES OF AMERICA,
By LAUGHLIN E. WATERS,
United States Attorney,
JOSEPH F. McPHERSON,
GEORGE F. HURLEY,
Assistant United States Attorneys,
/s/ By GEORGE F. HURLEY,
Its Attorneys. [7]

[Endorsed]: Filed June 16, 1955.

[Title of District Court and Cause.]

DECLARATION OF TAKING

To the Honorable The United States District Court:

I, the undersigned, James H. Douglas, Under Secretary of the Air Force of the United States of America, do hereby made the following declaration by direction of the Secretary of the Air Force:

1. (a) The land hereinafter described is taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a) and acts supplementary thereto and amendatory thereof, and under the further authority, of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257); the Act of Congress approved August 18, 1890 (26 Stat. 316) as amended by Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518, 50 U.S.C. 171), which acts authorize the acquisition of land for Military purposes; the Act of Con-

gress approved August 12, 1935 (49 Stat. 610, 611; 10 U.S.C. 1343a, b and c), which act authorized the acquisition of land for Air Force Stations and Depots; the National Security Act of 1947 approved July 26, 1947 (61 Stat. 495); the Act of Congress approved July 10, 1952 (Public Law 488, 82nd Congress) and the Act of Congress approved June 30, 1954 (Public Law 458, 83rd Congress), which said acts authorize acquisition of the land and appropriated funds for such purposes. [77]

(b) The public uses for which said land is taken are as follows: The said land is necessary adequately to provide for defense and Military purposes and other Military uses incident thereto. The land has been selected under the direction of the Secretary of the Air Force for acquisition by the United States for use in connection with Plancor 20, in San Diego County, State of California, and for such other uses as may be authorized by Congress or by Executive Order.

2. A general description of the land being taken is set forth in Schedule "A", attached hereto and made a part hereof, and is a description of the same land described in the petition in the above-entitled cause.

3. The estate taken for said public uses is the fee simple title, subject to existing easements for public roads and highways, for public utilities, for railroads and pipe lines.

4. Plans showing the land taken are annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by the undersigned as just compensation for the said land, with all buildings and improvements thereon and all appurtenances thereto and including any and all interests hereby taken in said land is set forth in Schedule "A" herein, which sum the undersigned causes to be deposited herewith in the registry of the Court for the use and benefit of the persons entitled thereto. The undersigned is of the opinion that the ultimate award for said land probably will be within any limits prescribed by law on the price to be paid therefor.

In Witness Whereof, the undersigned, the Under Secretary of the Air Force, hereunto subscribes his name by direction of the Secretary of the Air Force, this 1st day of June, A.D. 1955, in the City of Washington, District of Columbia.

/s/ JAMES H. DOUGLAS,

Under Secretary of the Air Force.

[Endorsed]: Filed June 16, 1955.

[Title of District Court and Cause.]

ANSWER

Comes now defendant County of San Diego, a political subdivision of the State of California, and in answer to plaintiff's first amended complaint herein admits and alleges as follows:

1. Admits the allegations of paragraph 9 of said first amended complaint that the County of San Diego claims an interest in the real property iden-

tified in paragraphs 5 and 6 of said first amended complaint by reason of taxes and assessments due and recoverable.

2. That this answering defendant has an interest in the real property described in plaintiff's first amended complaint and therein designated Tract A-100, said interest being a lien for The City of San Diego, County of San Diego and School District taxes for the years 1950 to 1954, both inclusive, together with penalties and interest thereon, which, at the time of the filing of this answer, amounts to the total sum of \$54.67.

3. That this answering defendant claims an interest in each and every parcel and tract of real property described in said first [120] amended complaint, said interest being a lien for The City of San Diego, County of San Diego, and School District taxes for the fiscal year 1954-55, which said taxes became a lien against said real property on the first Monday of March, 1955; that the amount of said taxes which became a lien on the first Monday of March, 1955 is not now known and is not yet due and payable; that the amount thereof will be ascertainable on or about October 1, 1955; that this answering defendant reserves the right to supplement this answer to set forth the specific amount of said taxes when the amount thereof is ascertainable.

Wherefore, Defendant County of San Diego prays that the court determine the amount of compensation and award of damages to be awarded for

the taking of each parcel and tract of real property described in plaintiff's first amended complaint and that the court ascertain the amount of taxes due, owing and payable to said defendant County of San Diego and order the payment thereof out of the compensation or damages awarded.

Dated August 5, 1955.

JAMES DON KELLER,

District Attorney and County Counsel in and for
the County of San Diego, State of California,

/s/ By ROBERT G. BERREY,

Deputy. [121]

[Endorsed]: Filed August 10, 1955.

[Title of District Court and Cause.]

APPEARANCE

To United States of America, Plaintiff, and to its Attorneys, Laughlin E. Waters, United States Attorney, Joseph F. McPherson and George F. Hurley, Assistant United States Attorneys:

You and Each of You place take notice that defendant County of San Diego, a political subdivision of the State of California, has filed an appearance in the above entitled action; that said defendant County of San Diego claims an interest in each and every parcel and tract of real property described in plaintiff's first amended complaint

[Title of District Court and Cause.]

SUPPLEMENTAL ANSWER

Comes now defendant County of San Diego, a political subdivision of the State of California, and supplements the answer heretofore filed and admits and alleges as follows:

1. That this answering defendant has an interest in each and every parcel and tract of real property described in plaintiff's first amended complaint, said interest being a lien for The City of San Diego, County of San Diego, and School District taxes for the fiscal year 1955-56, which said taxes became a lien against said real property on the first Monday of March, 1955; that the amount of said taxes which became a lien on the first Monday of March, 1955 is as follows:

Tract	San Diego Parcel No.	Tax Due	San Diego Co. Account No. (55-56)
A-100	10-123-3	\$ 6,716.86	77200
A-100	10-123-5	9.85	77201
A-101	10-122-1A & 4*	24,288.26	77195-1
A-101	10-122-1A & 4*	22,297.96	77195-4
A-102 &			
A-103	10-121-2	56,782.26	77195
A-104	10-120-3	50,202.15	77191
A-105	10-120-5	2,268.11	77193
A-106	10-120-2	117.65	77190
A-107	10-121-1X2	3,445.90	77195-3
A-108	10-122-2 &	3,604.21	77197
	10-123-1 (Void on 55-56 roll)		77198
A-109	10-120-1	1,751.28	77189

Tract	San Diego Parcel No.	Tax Due	San Diego Co.
			Account No. (55-56)
A-109	10-120-4	7,116.03	77192
A-109	10-121-1X2	3,445.90	77195-3
A-109	10-121-4 (Not on 55-56 roll S.D. owned)		
A-109	10-122-2	3,604.21	77197
A-109	10-123-1 & 9	6,416.25	77195-2
A-109	10-123-2	1,173.48	77199
A-109	10-123-7 (Not on 55-56 roll S.D. owned)		
A-110	10-123-1 & 9	6,416.25	77195-2
A-111	10-123-1 & 9	6,416.25	77195-2
A-112	10-121-2	56,782.26	77195
A-113	10-120-1	1,751.28	77189
A-113	10-121-1X2	3,445.90	77195-3
A-113	10-121-2	56,782.26	77195
A-114 to			
A-118, Inc.	10-120-1	1,751.28	77189
B-200	10-124-5A	304.00	77208
B-201	10-124-5X1	8,022.78	77207

that said amounts are subject to a 6% penalty as of December 12, 1955, except Tract B-200;

2. That in addition to the amounts hereinbefore alleged, this answering defendant has an interest in the real property described in plaintiff's first amended complaint and therein designated Tract A-100, said interest being a lien for The City of San Diego, County of San Diego, and School District taxes for the years 1950 to 1954 both inclusive, together with penalties and interest thereon, which at the time of the filing of this supplemental answer amounts to the total sum of \$54.23.

Wherefore, defendant County of San Diego prays that the court determine the amount of compensation and award of damages to be awarded for the taking of each parcel and tract of real property described in plaintiff's first amended complaint and that the court ascertain the amount of taxes due, owing and payable to said defendant County of San Diego and order the payment thereof out of the compensation or damages awarded.

Dated December 30, 1955.

JAMES DON KELLER,

District Attorney and County Counsel in and for
the County of San Diego, State of California,
/s/ By JOSEPH B. HARVEY,

Deputy. [127]

Affidavit of Service by Mail attached. [128]

[Endorsed]: Filed January 3, 1956.

[Title of District Court and Cause.]

MOTION OF PLAINTIFF FOR A RULE TO
SHOW CAUSE DIRECTED TO THE DIS-
TRICT ATTORNEY AND THE BOARD
OF SUPERVISORS OF SAN DIEGO
COUNTY, AND THE CITY ATTORNEY
OF THE CITY OF SAN DIEGO, WITH
RESPECT TO CANCELLATION OF
TAXES, OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT THAT SAID
COUNTY TAKE NOTHING BY ITS AN-
SWER

Comes now plaintiff, United States of America,

by Laughlin E. Waters, United States Attorney, and Joseph F. McPherson and George F. Hurley, Assistant United States Attorneys, and files this, its motion of plaintiff for a rule to show cause why the court should not enter an order directing the District Attorney of San Diego County (1) to lodge with the Board of Supervisors of said County, his consent to the adoption by said board, of a resolution directing the county auditor to cancel the 1955-1956 general taxes and the delinquent taxes described in the Supplemental Answer of defendant County of San Diego, upon all of the property acquired in fee title by the United States by its Declaration of Taking filed herein June 16, 1955, and (2) to request and procure, or cause to be transmitted to said Board of Supervisors, the consent of the City Attorney of the City of San Diego to the adoption of a resolution [129] by said Board of Supervisors, directing the auditor of the County of San Diego to cancel said taxes insofar as the said city is concerned, and a like order directed to the said Board of Supervisors to vacate and set aside its order denying the petition of the United States of America for the cancellation of said 1955-1956 general taxes and the delinquent taxes on a portion of said property as described in the Supplemental Answer of said County, and to consider and adopt a resolution directing the said auditor to cancel said taxes and, further, that said district attorney, city attorney and Board of Supervisors report to said court on a day certain of their action with respect thereto, or, in the alternative, for a

summary judgment against defendant County of San Diego that it take nothing by its Answer and Supplemental Answer, upon the ground that from its said Answer and Supplemental Answer it appears affirmatively that the said County of San Diego is not entitled to receive any part of the just compensation to be paid for the condemnation and taking of the several parcels of land involved in this action, and in support thereof alleges the following:

(a) Plaintiff acquired the full fee simple title to each and every of the parcels enumerated and identified in the Supplemental Answer of the defendant County of San Diego by a Declaration of Taking, filed by plaintiff in the above entitled cause on June 16, 1955, which Declaration of Taking specifically described said parcels and the estate taken by the plaintiff therein, and there was likewise deposited into the registry of the court the sum of \$2,600,000.00, in accordance with the estimate of the Secretary of the Air Force made in said Declaration of Taking, as the just compensation to be paid for the taking of said parcels, all in accordance with the provisions of Section 258a, Title 40, U. S. Code;

(b) That the said Declaration of Taking was duly recorded in the office of the recorder of deeds for the County of San Diego on June 20, 1955, and appears in the official records of said County [130] in Book 5686, page 463;

(c) That on June 16, 1955, there were in full force and effect in the State of California, Sections

1 and 8 of Article XIII of the constitution of the State of California,¹ and Sections 2192,² and 4986 and 4986.2,³ of the Revenue and Taxation Code of the State of California. [131]

(d) That the State of California was admitted

¹ Article XIII, §1. Taxable Property: Exemptions: Public Property.

Section 1. All property in the state except as otherwise in this constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to value. The word "property" * * * is hereby declared to include * * * matters and things real, personal and mixed * * *.

§8. Annual Property Statement.

Section 8. The legislature shall by law require each taxpayer in this state to make and deliver to the county assessor annually, a statement, under oath, setting forth specifically all the real and personal property owned by such taxpayer, or in his possession, or under his control, at 12 o'clock meridian, on the first Monday of March.

² §2192. Time of Attachment of Liens.

All tax liens attach annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied.

³ §4986. Cancellation of Taxes, Etc.: Authority to Cancel: Grounds: "Property Acquired" Defined: Consent of City Attorney: Cancellation Under Subparagraph (g).

All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be cancelled by the auditor on order of the board of supervisors with the written consent of the district attorney if it was levied or charged:

* * * (f) On property acquired after the lien date by the United States of America if such property, upon such acquisition, becomes exempt from taxation under the laws of the United States.

to the Union of the United States of America as a state upon a compact with the United States enacted into Federal Law, which law is, in part, as follows:

“An Act for Admission of the State of California”, September 9, 1850—Section 3—that the said State of California is admitted into the union upon the express condition that the people of said state, through their legislatures or otherwise, shall [132] never * * * levy any tax or assessment of any description whatsoever upon the public domain of the United States.”

(e) That in reliance upon and in conformity with the provisions of Section 1, Article XIII of said constitution, and Section 4986, Revenue and Taxation Code aforesaid, plaintiff did, on or about November 4, 1955, file with the Board of Supervisors of the County of San Diego a petition for the cancellation of the taxes alleged by the defend-

No cancellation under subparagraphs * * * (f) * * * of this section shall be made in respect of all or any portion of any taxes, penalties or costs attached thereto, collectible by county officers on behalf of a municipal corporation, without the written consent of the city attorney thereof.

§4986.2. Same: City Taxes: Procedure.

All or any portion of uncollected city taxes, penalties or costs may be cancelled on any of the grounds specified in Section 4986. If the city taxes are collected by the county, the procedure outlined in Section 4986 for the cancellation of taxes, penalties, or costs, shall be followed, except that the consent of the city attorney, in lieu of the consent of the district attorney, is necessary before cancellation * * *.

ant in its Answer and Supplemental Answer, to be due, which petition was duly received by said Board of Supervisors;

(f) That upon said application, action was taken on January 10, 1956, by the said Board of Supervisors, denying said petition of the plaintiff;

(g) That said adverse determination by the said Board of Supervisors was taken upon the refusal by the District Attorney for the County of San Diego of his consent to any cancellation of said taxes.

(h) Petitioner alleges upon information and belief, that the County of San Diego is collecting, by and through its collector of taxes, the general taxes for the purposes of the City of San Diego levied upon property within the said city; that all of the property described in the said Declaration of Taking lies wholly within the City of San Diego; that notwithstanding the provisions of Section 4986.2 of the Revenue and Taxation Code aforesaid, neither the District Attorney of the County of San Diego nor the Board of Supervisors of the County of San Diego asked for, nor received, the consent or refusal of the city attorney of the City of San Diego, to the cancellation of said taxes.

In support of this motion and petition the plaintiff-petitioner attaches hereto the affidavit of George F. Hurley, Assistant United States Attorney, together with Exhibits "A" and "B" therein referred to; [133]

Wherefore plaintiff-petitioner herein prays the

court that an order be issued to the defendant County of San Diego and its agents and officers, viz: the said District Attorney of the County of San Diego and the Board of Supervisors of the County of San Diego and to the City Attorney of the City of San Diego, and each of them severally, directing them, and each of them, to appear and show cause, if any they have, why the plaintiff should not obtain the relief hereinabove prayed for, and the plaintiff attaches hereto a draft of order to show cause to be directed to said defendant, which it requests the court to approve and execute and cause to be served in the manner provided by Rule 56 of the Federal Rules of Civil Procedure.

Dated: This— day of March, 1956.

UNITED STATES OF AMERICA,
LAUGHLIN E. WATERS,

United States Attorney,
JOSEPH F. McPHERSON,
GEORGE F. HURLEY,

Assistant United States Attorneys,
/s/ By GEORGE F. HURLEY. [134]

Verification of George F. Hurley

State of California

County of Los Angeles—ss.

George F. Hurley, being first duly sworn, deposes and says:

That he is an Assistant United States Attorney for the Southern District of California, and is in

charge of the records and files of plaintiff in the above entitled action;

That he has read the foregoing Motion for a Rule to Show Cause and knows the contents thereof;

That the facts therein alleged are true of his own knowledge, except as to matters that are therein stated on information or belief, and as to those matters, he believes them to be true.

/s/ GEORGE F. HURLEY

Subscribed and sworn to before me this 19th day of March, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk of the U. S. District Court of the Southern
District of California.

/s/ By WAYNE E. PAYNE,
Deputy. [135]

Affidavit of George F. Hurley in Support of Motion of Plaintiff for Rule to Show Cause Against County of San Diego

State of California
County of Los Angeles—ss.

George F. Hurley, being first duly sworn, deposes and says:

That on June 17, 1955, the undersigned caused to be transmitted to the recorder of deeds of the County of San Diego a certified copy of the Declaration of Taking filed in this action June 16, 1955;

That said Declaration of Taking was duly re-

corded in the office of the recorder of deeds on June 20, 1955, in Book 5686, page 463 of Official Records of said county;

That on November 4, 1955, he caused to be mailed to the Board of Supervisors of the County of San Diego, a petition for cancellation of the general taxes for the fiscal year 1955-1956, upon all of the real property and improvements there included and being condemned and taken by action 1506-SD of this Court, a copy of which petition is attached hereto, marked Exhibit "A", and by this reference made a part hereof;

That thereafter on January 18, 1956, there was delivered to the undersigned affiant a letter from the deputy clerk of the County of San Diego for the office of the Board of Supervisors of San Diego County, a photostatic copy of which is attached hereto and marked Exhibit "B", and by this reference made a part hereof, which said letter advised this affiant and the United States Attorney for the Southern District of California, that on January 10, 1956, said petition was denied;

That contained in the letter from the deputy clerk for the County of San Diego aforesaid, was an excerpt quoted from a letter from the District Attorney of the County of San Diego to the Board of Supervisors, which affiant, on information and belief, states was delivered to said Board of Supervisors prior to January 10, 1956. [136]

/s/ GEORGE F. HURLEY

Subscribed and sworn to before me this 19th day of March, 1956.

[Seal] JOHN A. CHILDRESS,

Clerk of the U. S. District Court of the Southern District of California.

/s/ By WAYNE E. PAYNE,
Deputy. [137]

EXHIBIT "A"

Petition for Cancellation of Assessment of Tax
Under Section 4986, Rev. & Tax. Code

To: The Honorable Board of Supervisors, County
of San Diego, State of California:

The United States of America hereby petitions your Honorable Body to order the cancellation of taxes and assessments on the following described property:

See Exhibit "B" attached hereto and by this reference incorporated into this Petition for Cancellation.

This petition is made in accordance with the provisions of Section 4986 of the Revenue and Taxation Code, the United States of America having acquired title to the above described property by virtue of Declaration of Taking, filed June 16, 1955 in the United States District Court for the Southern District of California, Civil Action No. 1506-SD, having been recorded June 20, 1955 in Book 5686, Page 463, Official Records of San Diego County.

Dated: November 4, 1955.

United States of America,
Laughlin E. Waters,
United States Attorney,
/s/ By George F. Hurley,
Assistant U. S. Attorney

GFH:fbp

To: Laughlin E. Waters, United States Attorney
Lands Division, 821 Federal Building,
Los Angeles 12, California

Taxes cancelled this day of.....,
19... (Cancellation No., dated)

County Auditor
By
Deputy [138]

EXHIBIT "B"

[Letterhead of County of San Diego Board of
Supervisors]

January 17, 1956

Laughlin E. Waters, United States Attorney
Lands Division, 821 Federal Building
Los Angeles 12, California

Dear Sir:

The Board of Supervisors has received your petition of November 4, 1955, for cancellation of taxes and assessments on certain property acquired by the United States by virtue of a declaration of taking filed June 16, 1955, in the United States

District Court for the Southern District of California, Civil Action No. 1506-SD.

The District Attorney for the County of San Diego advises as follows:

“This petition seeks the cancellation of 1955-56 taxes in the amount of \$334,912.62 and delinquent taxes in the amount of \$54.23 or a total of \$334,966.85 in County taxes on properties taken in eminent domain proceedings by the United States. This office has duly filed the answer of the County, setting up its right to be paid these taxes out of the condemnation awards to be posted in the action. Consent of this office to any cancellation of these taxes is accordingly denied.”

On January 10, 1956, the Board of Supervisors of San Diego County denied your petition for cancellation of said taxes.

Yours very truly,

R. B. James,

County Clerk and ex officio Clerk of the Board of Supervisors,

/s/ By J. Miller,

Deputy

JM:pm cc: Assessor [139]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE PURSUANT TO
MOTION OF PLAINTIFF-PETITIONER

To: President of the Board of Supervisors of the
County of San Diego and to the Said Board;

and to James Don Keller, District Attorney for the County of San Diego; and to Jean F. DuPaul, City Attorney for the City of San Diego, California:

Upon reading the motion and petition of plaintiff United States of America, and the affidavits, exhibits and memoranda in support thereof, and good cause appearing therefrom:

You and each of you are directed to appear in the United States District Court for the Southern District of California, Southern Division, on Tuesday, the 10th day of April, 1956, to show cause, if any you have,

(1) Why the court should not enter an order directing the District Attorney of San Diego County (i) to lodge with the Board of Supervisors of said county, his consent to the adoption, by said [140] board, of a resolution directing the county auditor to cancel the 1955-1956 general taxes upon all of the property acquired in fee title by the United States by its declaration of taking filed herein June 16, 1955, and the delinquent taxes due on certain portions of said property condemned, for the fiscal year 1955-1956 as to the current taxes, and for the fiscal years 1950-1954 as to the delinquent taxes and, (ii) to request and procure, or cause to be transmitted to the said Board of Supervisors, the consent of the City Attorney of the City of San Diego to the adoption of a resolution by the said Board of Supervisors directing the auditor of the County of San Diego to cancel said taxes insofar as the City of San Diego is concerned, and

(iii) a like order directed to the said Board of Supervisors to vacate and set aside its order denying the petition of the United States for the cancellation of said 1955-1956 general taxes and the delinquent taxes aforesaid, and to consider and adopt a resolution directing said auditor to cancel said taxes, and (iv) directing said District Attorney, City Attorney and Board of Supervisors to report to this Court on a day certain of their action with respect thereto or, in the alternative,

(2) Why a summary judgment should not be entered against the said County of San Diego that upon its said Answer and Supplemental Answer it take nothing by this action.

It is further Ordered that a copy of this order and of the petition of said plaintiff, together with supporting affidavits, exhibits and memoranda, be served upon the said Chairman of the Board of Supervisors of the County of San Diego and upon James Don Keller, its District Attorney, and Jean F. DuPaul, City Attorney, City of San Diego, and return thereon be made showing service hereof, and

You are further directed to file in this action any counter-petitions, motions, affidavits, or pleadings in response to this [141] Order and in opposition to the motion of plaintiff-petitioner, if any you desire to file, not later than March 30, 1956.

Dated: This day of March, 1956.

.....

United States District Judge. [142]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES

I.

This court has jurisdiction to compel the officers of the County of San Diego named in plaintiff's Motion and Petition, to comply with California laws regarding cancellation of taxes.

(a) Article III, Section 2, United States Constitution. This is a controversy in which the United States is a party.

(b) Title 40, U.S.C., Section 258a. The court shall have power to make such orders in respect of * * * liens * * * taxes * * * and other charges * * * as shall be just and equitable.

(c) This is a federal question. The property of the United States is not subject to any form of state taxation unless Congress expressly consents.

U. S. v. County of Allegheny, 322 U. S. 174, 64 S. Ct. 908, 88 L. Ed. 1209;

Van Brocklin v. State of Tennessee, 117 U. S. 151, 29 L. Ed. 845.

(d) The Board of Supervisors and its officers are here bound by both State and Federal Law.

Since the text of paragraph (f) of Section 4984, Revenue and Taxation Code, gives the right to cancellation "if such property upon such acquisition becomes exempt from taxation under the laws of the United States", the Board of Supervisors of San Diego County and its officers were bound by the decisions of the Supreme Court of the United

States that, as a proposition of law, such property is exempt. In the face of those precedents the County cannot compel collection of this tax or enforce it by sale. Thus this court has jurisdiction of the defendants.

McCullough v. Maryland, 4 Wheat 316, 4 L. Ed. 579;

Van Brocklin v. Tennessee, *supra*;

U. S. v. Allegheny County, *supra*.

II.

Under California and Federal laws, it is the duty of the officers of the County of San Diego to cancel, at petition by plaintiff, the taxes upon the lands acquired by it with the filing of its Declaration of Taking and deposit of the estimated compensation into the court registry.

(a) Article XIII, Sections 1 and 8, Constitution of the State of California. West's Annotated California Codes, Constitution, Vol. 3, P. 97 and P. 158;

(b) Revenue and Taxation Code of California, Sections 4986 and 4986.2, and Section 2192 (fixing lien date). Deerings California Codes, Revenue and Taxation, C. A., Vol. 1. [144]

(c) Title 40, U.S.C., Section 258a.

(d) The County may make no presumption about the matter other than that the properties are exempt.

Los Angeles v. Board of Supervisors of Mono County, 108 Cal. App. 655 (1930).

III.

Under California laws the obligation to cancel the taxes is not subject to exercise of discretion on the part of the officers of the County if the application of the United States is in due form of law and fair on its face. The word "may" appearing therein is to be construed as "must" when the applicant is a public body.

City of Los Angeles v. Board of Supervisors of County of Mono, 108 Cal. App. 655 (1930);

City of Los Angeles v. Ford, 12 Cal. App. (2d) 407 (1938);

County of Los Angeles v. State, 64 Cal. App. 290, 222 Pac. 153;

Ops. of Attorney General of California, Vol 2, p. 526; Vol. 4, p. 308; Vol. 6, p. 72.

IV.

(Note: As we read the statutes of the State of California which entitle the United States to cancellation of the taxes, the following elements and steps must appear to exist and have been taken:

1. The taxes must be uncollected;
2. The property, when acquired, must be exempt under the laws of the United States;
3. The property must have been acquired by the United States after the lien date;
4. The petitioner must make satisfactory proof of the facts which, under the laws, entitle it to cancellation). [145]

The application of the United States for can-

cancellation of the taxes was in due form of law and fair on its face.

1. The taxes were uncollected. (This is conceded by the County by its Answer);

2. Because the property was owned by the United States, it must be presumed that it was exempt from taxation under the laws of the United States, and the County could, at the most, only suspend cancellation until inquiry was made on that point. Exhibit "B" to Hurley affidavit shows that this was not done;

3. The property was acquired by the United States after the lien date fixed by law.

The tax lien date for the 1955-1956 taxes was 12 Meridian, the first Monday in March of 1955,—that was March 7, 1955. The property was acquired by Declaration of Taking filed, and deposit made, June 16, 1955.

Article XIII, Section 8, and Revenue and Taxation Code of California, Section 2192.

4. Petitioner made satisfactory proof of the facts entitling it to cancellation.

Exhibit "A" to Hurley affidavit establishes:

(a) The United States owned the property. (Reference was made therein to copy of Declaration of Taking filed and recorded);

(b) The property was in sovereign public use and exempt by United States law. The recorded document showed the acquisition to be in fee for military purposes;

(c) Application to the County for cancellation

was made after lien date, as is shown by the date on the exhibit; [146]

(d) Defendant's Answer, filed August 9, 1955, admitted that the taxes were due even though not then ascertained as to amounts and, therefore, uncollectible.

5. The District Attorney could refuse consent only if applicant had not made out a case, as above demonstrated. His denial did not recite that applicant had failed in any of these elements or steps.

Discussion

The California Revenue and Taxation Code, Section 4986 (enacted in 1939) provides in part:

"All or any portion of any uncollected tax, penalty, or costs heretofore or hereafter levied, may, on satisfactory proof, be cancelled by the auditors on order of the board of supervisors, with the written consent of the district attorney, if it was levied or charged: * * * (f) on property acquired after the lien date by the United States of America, if such property upon such acquisition becomes exempt from taxation under the laws of the United States."

Since 1819, when *McCullough v. Maryland*, 4 Wheat (U. S. 1) 316, 4 L. Ed. 579, was decided, it has been established that the property of the United States is immune from any form of state taxation, even when it is in the hands of corporate agencies of the United States, unless Congress expressly consents to the imposition of such liability.

Van Brocklin v. Tennessee, 117 U. S. 151, 29 L. Ed. 845, 6 S. Ct. 670;

United States vs. Allegheny County, 322 U. S. 174, 88 L. Ed. 1209, 64 S. Ct. 908.

There is no federal statute, applicable to the case at bar, in which Congress has waived the exemption of the property taken from state taxation, and the burden of proving that there is, is in [147] the County.

Los Angeles v. Board of Supervisors of Mono County, 108 Cal. App. 655 (1930).

Public lands are not taxable and there is no presumption that they are taxable, the presumption being to the contrary.

Los Angeles v. Board of Supervisors of Mono County, 108 Cal. App. 655 (1930).

In the case last above cited, a writ of mandate was brought to compel cancellation of certain tax assessments and tax deeds under provisions of Section 3804a of California Political Code (predecessor statute to Section 4986 cited *supra*). The tax was imposed by the Board of Supervisors of Mono County. Los Angeles City had acquired the land in question from the United States. The "patent right" to the land was assessed by Mono County, and the City requested cancellation of the assessments. It was argued that the Board of Supervisors had a discretion to deny the city's petition to cancel taxes. The court held that the Board must cancel the taxes. These were public lands and not taxable.

The duty placed upon the Board of Supervisors

to cancel taxes upon petition of the United States is mandatory.

In *City of Los Angeles v. Ford*, 12 Cal. (2d) 407 (1938) the court considered Section 3804a of the Political Code, *supra*, and held the duty to be mandatory. Incidentally, the court even held that the fact the property might revert to private ownership is of no consequence.

The court, in *Los Angeles v. Board of Supervisors of Mono County*, 108 Cal. App. 655, *supra*, on this point said, at page 666:

“It is further argued that the Board of Supervisors of Mono County, nevertheless, had a discretion to deny the appellant’s petition by reason of the use of the word “may” in Section 3804a of the Political Code. This contention, however, is untenable.” [148]

In the case of *County of Los Angeles v. State*, 64 Cal. App. 290 (222 Pac. 153), the same court considered somewhat at length the use of the word “may”, and under what circumstances it would be held mandatory and not merely permissive, and it was there held, (quoting from the syllabus):

“While the word “may” is primarily and ordinarily a permissive term and not peremptory, nevertheless, when the rights of the public or of other persons, in this case, the State of California, are dependent upon the exercise of the power conferred, the word “may” takes on a mandatory form and the performance of the act provided for it is neither optional nor

discretionary upon the person or officer designated and authorized to perform the act."

(Pet. for hearing by Cal. Sup. Ct. denied.)

The following opinions of the Attorney General of California, in interpreting and advising upon Political Code, Section 3804a, and the successor statute, Revenue and Taxation Code, Section 4986, are persuasive on the subject. The opinions should be given special weight in this field since it is one in which the Attorney General of California, the constitutional officer charged with this duty, is advising the district attorneys and governmental agencies concerning their rights to cancel taxes.

1. 2 Op. Atty. Gen. 526 (Op. NS-5265—Dec. 28, 1943), involved a petition for cancellation of taxes requested by the Veterans Welfare Board. The opinion considered that former Section 3804a of the Political Code was held by the courts to give a mandatory meaning to "may", and that the present statute gives a mandatory meaning to "may." It is the duty of the board of supervisors to cancel such taxes, and this duty may be enforced by writ of mandamus.

2. 4 Atty. Gen. Op. 308 (Op. NS-5501—Sept. 12, 1944). An opinion was requested on the right of a public utility district [149] to obtain cancellation of assessments levied by a sanitary district. The opinion stated that it is now settled that cancellation of taxes may be compelled where property is acquired by public authority after the lien date. Hence the board of supervisors may properly can-

cel taxes levied, which became a lien on property acquired by the public utility, prior to the date of acquisition.

3. 6 Atty. Gen. Op. 72 (Op. 45-144—Aug. 20, 1945) stated that a municipal ordinance in conflict with Revenue and Taxation Code Section 4986, must yield. Hence cancellation of tax liens of City of Bakersfield on property acquired by a school district must be done.

Article V, Section 21, of the California Constitution, provides in part as follows:

“* * * the Attorney General shall be the chief law officer of the state and it shall be his duty to see that the laws of the State of California are uniformly and adequately enforced in every county of the State. He shall have direct supervision over every district attorney * * * in all matters pertaining to the duties of their respective offices. * * *”

The courts have said the following concerning the opinions of the Attorney General of California:

In *People v. Shearer*, 30 Cal. 645 (1866), *supra*, it was said that the opinions of the Attorney General are considered quasi judicial in character and entitled to great respect by reason of his duties and relation to the government, notwithstanding the fact that his opinions are not of controlling authority.

In *Hutchins v. County Clerk of Merced County*, 140 Cal. App. 348, 35 P. (2d) 563, the court said

that although the opinions of the Attorney General are not of the same weight or authority as those of the court, yet if the former's opinion coincides with the opinion of the court, the latter can properly adopt it. [150]

In summary, upon acquisition of property by the United States in fee, there is a mandatory duty imposed upon the Board of Supervisors to cancel all taxes and penalties then due, whether delinquent or current taxes, upon petition of the United States for such cancellation. The fact that a lien may have been imposed upon the property prior to the date of acquisition does not change the rule. The duty of the District Attorney is to advise upon the legality of the request for cancellation, and not pass upon matters of policy, which is a legislative function. There is no discretion placed in the District Attorney to deny the request, provided the request for cancellation meets the statutory requirements.

In a proper case the obligation of the board of supervisors to cancel could be enforced by suit for mandamus. It is not necessary to take this step in the case at bar as there is a complete remedy here available to the plaintiff United States. This being a federal question, the jurisdiction and powers of the court are plenary to enforce both the California law and the Federal law, and under Section 258a of Title 40, U.S.C., the court has the right to act as if this were an action in mandamus to see that justice and equity are attained.

Since the statutory duty is placed upon the Board of Supervisors of San Diego County to cancel the

taxes upon petition being made by the United States, under the facts before the court, the County of San Diego has had nothing taken from it requiring assessment of compensation to it, as it has no right to recover taxes, whether current or delinquent, from the funds in the registry of the court. Likewise, the County of San Diego has no right to recover in this action upon any previous interest it may have had in real property taxes.

Finally, it would hardly be just or equitable for the County to prevail. If it did, then the tax would have to be paid in full out of the registry deposit, for the tax year 1955-1956, by owners [151] who had no title to, and no benefit from, the use of the property from June 16, 1955 to June 30, 1956 when the tax year ends. Also, they had already paid in full, in 1954, the taxes on said property up to June 30, 1955. Hence the County lost nothing because the United States took title fourteen days before the year ended for which the taxes were paid.

Furthermore, if the County was allowed to recover, it would defeat by a technicality, at the expense of the former owners, the clear mandate that real property and improvements thereon devoted to a public use are immune from taxation.

The United States here is proceeding as *parens patriae* to protect its citizens from an overreaching.

As we view it, Congress could have had such events in mind when it wrote Section 258a of Title 40, U.S.C. into law.

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney,

JOSEPH F. McPHERSON,

GEORGE F. HURLEY,

Assistant United States Attorneys,

/s/ By GEORGE F. HURLEY,

Attorneys for United States

of America. [152]

Acknowledgment of Service by Mail attached. [153]

[Endorsed]: Filed March 19, 1956.

[Title of District Court and Cause.]

MOTION TO STRIKE

To Defendant the County of San Diego, a Political Subdivision of the State of California, and to James Don Keller, District Attorney and County Counsel, and to Robert G. Berrey, Deputy, Its Attorneys:

You, and Each of You, Will Please Take Notice that defendants Charles W. Carlstrom, also known as C. W. Carlstrom, The Salvation Army, a California corporation, The Salvation Army, a New York corporation, the Southern California District Council of the Assemblies of God, Inc., a non-profit corporation, and the [154] Southern California Children's Aid Foundation, Inc., a non-profit corporation, will move the above entitled Court on the 12th day of April, 1956, at the hour of 10:00 a.m.

on said day, or as soon thereafter as counsel may be heard, for an order striking paragraph 3 of the Answer of said defendant County of San Diego, filed on or about August 10, 1955, and paragraph 1 of the Supplemental Answer of said defendant, filed on or about January 3, 1956.

Said motion will be based upon the grounds that:

1. The alleged lien for city, county and school district taxes, referred to in said paragraphs of said Answer and Supplemental Answer is not a valid lien under the laws of the State of California against the property described in plaintiff's First Amended Complaint in Condemnation, as amended, and,

2. The alleged lien for city, county and school district taxes is not a valid lien under the laws of the State of California against any funds hereinbefore or hereinafter deposited in Court pursuant to the Declaration of Taking filed herein by plaintiff on or about June 16, 1955, and,

3. The alleged lien for said city, county and school district taxes is not a valid lien under the laws of the State of California against any funds hereinafter deposited into Court or paid to these moving defendants pursuant to any judgment in condemnation or settlement of the above entitled action.

Said motion will be further based upon all of the pleadings, documents and records on file herein and upon the points and authorities attached hereto and filed concurrently herewith.

Dated: April 12, 1956.

PROCOPIO, PRICE, CORY and
SCHWARTZ and PAUL, HAST-
INGS and JANOFISKY,

/s/ By LEONARD S. JANOFISKY,

Attorneys for defendant Southern California Chil-
dren's Aid Foundation, Inc., a non-profit cor-
poration. [155]

PAUL, HASTINGS & JANOFISKY,

/s/ By LEONARD S. JANOFISKY,

Attorneys for defendant Southern California Dis-
trict Council of the Assemblies of God, Inc.,
a non-profit corporation.

RUBIN & SELTZER,

/s/ By NORMAN T. SELTZER,

Attorneys for The Salvation Army, a California
corporation, and The Salvation Army, a New
York corporation.

HILL, FARRER & BURRILL,

/s/ By ALBERT J. DAY,

Attorneys for defendant Charles W. Carlstrom, also
known as C. W. Carlstrom. [156]

POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE

The County of San Diego by its Answer filed on
or about August 10, 1955 and its Supplemental An-
swer filed on or about January 3, 1956 is asserting
an alleged lien against the various tracts of proper-

ties owned by these moving defendants on behalf of itself, the City of San Diego and certain unspecified School Districts. All of these taxes are allegedly due for the fiscal year 1955 to 1956 with the exception of Tract A-100 which is owned by a separate party.

The validity, effect and application of a tax lien upon the deposit and award in a condemnation action brought by the United States is determined by the local law of the state in which the property is situated.

People of Puerto Rico vs. United States, 131 F. 2d 151

United States vs. 25.936 Acres of Land in the Borough of Edgewater, 153 F.2d 277, 279

United States vs. Certain Parcels of Land in the City of San Diego, 44 Fed. Supp. 936

The California Revenue and Taxation Code, Sec. 2192, provides:

“All tax liens attach annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied.”

Article XX, Sec. 5, of the Constitution of California, provides:

“The fiscal year shall commence on the first day of July.”

On June 16, 1955, the date upon which plaintiff filed its Fee Declaration of Taking, the California Code of Civil [157] Procedure, Sec. 1252.1, provided:

“1252.1. [Taxes, penalties, costs: Computation: Payment from award.] At the time of commencement of the trial of any condemnation action in which a public agency exempt from taxes is the plaintiff, the clerk of the court shall serve upon the officer or officers responsible for the computation of all ad valorem taxes on the property being condemned, written notice to prepare and file with the clerk of the court a certificate of all delinquent taxes, penalties and costs, and of all current taxes, due and payable on said property as of the date said notice was served. There shall be filed by the clerk with the court, as part of the records in said action, a copy of said written notice with the acknowledgment of service and the date thereof endorsed thereon by the officer so served. For the purposes of this section, the term taxes shall include ad valorem special assessments levied and collected in the same manner as other taxes. In the event said notices are served at a time when the amount of the current taxes, which are a lien on the property but not yet payable, are not known to the certifying officers, said certificates shall contain, in lieu of a statement of the current taxes, a statement based on (1) the assessed value for the current year of the property being condemned, and (2) the tax rate for the previous fiscal year. Said certificates shall be filed with the clerk of the court, as a part of the records and files of said condemnation action, within 10 days after the [158] service of said notices, and in the event of failure on the part of any officer upon whom such notice is served to file said certifi-

cates within said time, it shall be conclusively presumed that as to the taxes for the collection of which such officer is responsible, no taxes are due and payable on said property, or in any manner constitute a lien thereon.

Before making any final order of condemnation in such action, the court shall determine whether said certificates have been filed by all officers upon whom the notices have been served. If said certificates have been filed, the court shall as a part of the judgment direct the payment to the tax collecting agencies, out of the award, the amounts of the delinquent taxes, penalties and costs, and the amounts of the current taxes, shown by said certificates to be due and payable. In the event said certificates show that the amounts of the current taxes which are a lien are not known, and in lieu of the statement of current taxes contain a statement based on the assessed value for the current year and the tax rate for the previous year, the court shall in lieu of directing the payment of current taxes order the payment of sums bearing the same relation to the amounts shown in said statements as the portion of the current fiscal year from the commencement thereof to the date of the final order of condemnation bears towards an entire fiscal year; provided, that in the event an order permitting the plaintiff to take immediate [159] possession was entered in such action, prior to the payment of any taxes for the fiscal year during which said order was entered, the court shall, for such fiscal year, order the payment of a sum bearing the same relation to the

amount of the taxes for such fiscal year, or in the event said amount is not known, to the amount shown in said statement based on the assessed value for the current year and the tax rate for the previous year, as the portion of such fiscal year from the commencement thereof to the date of entry of such order of immediate possession bears towards an entire fiscal year.

In any such action, the payment of the sums ordered by the court to be paid shall be considered to be in lieu of all taxes, current and delinquent, and all penalties and costs, due and payable with respect to the property being condemned, and said judgment shall, in addition to ordering said payments, order the cancellation, as of the date of the judgment, of all taxes, current and delinquent, and all penalties and costs, on said property. Said judgment shall be conclusively binding on all tax collecting agencies upon which the notices were duly served by the clerk of the court.

The subject of the amount of the taxes which may be due on any property shall not be considered relevant on any issue in any such condemnation action, and the mention of said subject, either in the voir dire examination of jurors, or during the examination of witnesses, or as a part of the court's instructions to the jury, or in argument [160] of counsel, or otherwise, shall constitute grounds for a mistrial in any such action. [Added by Stats. 1953, ch. 1792, § 1.]” [Emphasis added] [Repealed by Stats. 1955, ch. 1229, § 1, effective September 1, 1955.]

This statutory provision relates to all condemna-

tion actions in which "a public agency exempt from taxes is the plaintiff * * *" The plaintiff herein, the United States Government, is such an agency.

In essence, this section of the Code of Civil Procedure provides that all unpaid ad valorem taxes, even though a lien on the property, are to be prorated from the commencement of the fiscal year to the date upon which title passes to the tax exempt condemnor or it is given immediate possession of the property. As a result thereof, the filing of the government's Declaration of Taking on June 16, 1955, which is prior to the commencement of the fiscal year 1955 to 1956, would prevent the payment of any taxes from the award in condemnation herein since title passed to the government on said date and it was given immediate possession of the property.

In *Collector of Revenue vs. Ford Motor Company*, 158 F.2d 354, the court, in discussing the effect of a lien for local taxes, held, at page 356:

"We think the court erred in holding that in the absence of some state law to the contrary, the lien for taxes might be split or apportioned. The rule is that absent some state law to the contrary, such lien must be paid in its entirety * * *

The local law must, of course, be consulted to determine when the lien attached, and if the lien has attached, as in the instant [161] case, before the United States acquired title, whether the local law permits apportionment of the taxes assessed. [Emphasis added]

The question of the applicability of a state apportionment statute was also considered in a series of cases involving 25.936 Acres of Land in Edgewater, New Jersey. In the District Court case, *U. S. vs. 25.936 Acres of Land, etc.*, 57 Fed. Supp. 383, a New Jersey statute provided that upon acquisition through eminent domain, the owner of the property to be acquired should be liable for the payment of such proportion of the taxes for the current year as the time between the previous January 1 and the date the condemning body acquired its title bears to the full calendar year. The District Court held that the owner was entitled to the full award. On appeal, the Circuit Court, in 153 F.2d 277, reversed the lower Court and directed the owner to obtain a decision of the New Jersey Courts as to when the tax lien attached. In the subsequent New Jersey case of *Borough of Edgewater vs. Corn Products Refining Co.*, 136 N.J. Law 220, 53 Atl. 2d 212, the Court actually apportioned the taxes in accordance with a statutory mandate similar to that in California.

Title passes to and vests in the United States upon the filing of a declaration of taking and the deposit of the estimated just compensation into court. (40 U.S.C.A., Sec. 258a) Thus, at the time of the filing of the plaintiff's Declaration of Taking, June 16, 1955, the United States, a tax exempt public agency, not only became the fee owner of the property but became entitled to and actually went into possession of the fee interests in the property. This was done approximately one-half of a month

before the commencement of the current 1955 to 1956 fiscal year.

The rights of the parties are fixed and determined as of the date when the declaration of taking is filed. [162]

Danforth vs. U. S., 308 U.S. 271, 284, 84 L.Ed. 240, 246

Weber vs. Wills, 154 F.2d 1004

The effect of the filing of the declaration of taking on the rights of the parties was succinctly stated in *United States vs. Bennett*, 57 Fed. Supp. 670, at pages 673 to 674, where the court held:

“The determination of the persons entitled to compensation out of the award must be made as of November 16, 1942, the date of the filing of the declaration of taking. ‘For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or a later date, receives the payment.’ *Danforth v. United States*, 308 U.S. 271, 284, 60 S.Ct. 231, 236, 84 L.Ed. 240. The award stands in the place of the property. *Washington Water Power Co. v. United States*, 9 Cir., 135 F.2d 541. Since, as of the date of taking the property had been foreclosed and a certificate of sale issued and assigned to the Cement Company, the question for determination is what was the legal position of the holder of the certificate of sale as of that date? Since the sale was conducted by authority of the state statute, *Rem.Rev.Stats. of Wash.* §§ 578 to 603 inc., the status of the party claiming under it must be determined on the basis of local law.” (Page 673-674)

The validity of the tax liens of the County of San Diego, City of San Diego and the School District depends upon [163] the entire law of the State of California. In *United States vs. Certain Parcels of Land in the City of San Diego*, 44 Fed. Supp. 936, the Court in holding, prior to the enactment of Code of Civil Procedure, Sec. 1252.1, that the tax lien attached for the entire fiscal year, considered not only the applicable Revenue and Taxation Code sections but also the pertinent provisions of Code of Civil Procedure, Sec. 1248, which applies to actions in eminent domain (see pages 937 to 939). Although the result in that case was to enforce the tax lien, we respectfully submit that this Court must also consider the effect of the relevant provisions of Code of Civil Procedure, Sec. 1252.1.

Code of Civil Procedure, Sec. 1252.1, is a specific apportionment statute dealing with and controlling the extent of the taxing authority's lien upon the award in condemnation. Its clear mandate is that a property owner, who has been deprived of title or possession of his property, should not be required to pay taxes for any portion of the fiscal year subsequent to such event. The equity of such a statute is particularly applicable to the case at bar where the actual title to the property passed to the United States prior to the commencement of the current fiscal year. To permit a tax lien for the entire fiscal year to be deducted from the award in condemnation would be unjust and inequitable to these moving defendants, and, we respectfully submit, would violate the clear mandate of Code of Civil Proce-

ture, Sec. 1252.1. Therefore, we respectfully submit that the motion of these defendants be granted.

Dated: April 12, 1956.

Respectfully submitted,

HILL, FARRER & BURRILL,

/s/ By ALBERT J. DAY [164]

PAUL, HASTINGS & JANOFSKY,

/s/ By LEONARD S. JANOFSKY

RUBIN & SELTZER,

/s/ By NORMAN T. SELTZER [165]

[Endorsed]: Filed April 12, 1956.

[Title of District Court and Cause.]

MEMORANDUM

This matter comes before the court on an order to show cause, issued on the motion of the plaintiff, United States of America, directed to the Board of Supervisors of San Diego County, the District Attorney of that County and the City Attorney of San Diego. It required them to show cause why the plaintiff should not have certain relief by way of mandamus looking towards the cancellation of taxes pursuant to Sections 4986 and 4986.2 of the Revenue and Taxation Code, or in the alternative for a summary judgment against the County of San Diego on its answer and supplemental answer heretofore filed. These answers set forth the claim of the County of San Diego to taxes on the real property involved in this condemnation action collectible by the County of San Diego, for the City of San Diego, pursuant to State statutes.

The motion and the order to show cause were originally directed to the sum of \$54.23 delinquent taxes on certain of the property, and to taxes in excess of \$300,000 for the fiscal [166] year 1955-56, that is the year beginning July 1, 1955 and ending June 30, 1956, which taxes become a lien against the real property on the first Monday of March, 1955.

After the filing of the motion and the order to show cause the government amended its showing by eliminating the reference to the delinquent taxes in the sum of \$54.23 for the fiscal years prior to 1955-56. This matter is thus presently not before us.

The United States acquired the real property and the fee simple thereof by a declaration of taking filed on June 16, 1955, and recorded with the County Recorder on June 20, 1955. Thus, the government took the property before the beginning of the fiscal year to which the \$300,000 in taxes pertained. However, these taxes became a lien on the property on the first Monday in March, 1955, Sec. 2192 Revenue and Taxation Code. The government's argument on the equities of the matter, namely that the taxes for the '55-'56 fiscal year pertained to a fiscal year after the date of taking is no more pertinent to the legal issues than is defendant's argument as to how it is hurt by the removal of property from its tax rolls by government taking.

If the statutes of the State of California, particularly § 4986 and § 4986.2 of the Revenue and Taxation Code permit the cancellation of taxes, then we

are not concerned with these equitable matters urged by the parties.

City of Los Angeles v. Ford [1938] 12 Cal. 2d 407, was decided under the predecessor statute, § 3804(a) Political Code. It reversed a judgment in a mandamus proceeding where the trial court refused to cancel taxes. It relied on *People v. Board of Supervisors* [1932] 126 Cal. App. 670. See also, *City of Los Angeles v. Board of Supervisors of Mono County* [1930] 108 Cal. App. 655, which held that the word "may" means "must" and there was no discretionary action involved where a public body [167] sought cancellation of unpaid taxes under the statute, and relied on *County of Los Angeles v. State* [1923] 64 Cal. App. 290.

§4986, Revenue and Taxation Code as it now reads, is somewhat different from the wording of § 3804(a) of the Political Code as it read in 1938, when *City of Los Angeles v. Ford*, *supra*, was decided by the Supreme Court. The differences we believe, are immaterial.

§ 4986 provides that taxes "may, on satisfactory proof, be cancelled by the auditor on order of the board of supervisors with the written consent of the district attorney if * * *", and further provides that no cancellation under subparagraph (f) relating to lands acquired by the United States, shall be made of any taxes "collectible by county officers on behalf of a municipal corporation without the written consent of the City Attorney thereof."

§ 3804(a) of the Political Code, predecessor of § 4986 Revenue and Taxation Code, provided that

uncollected taxes "may, upon satisfactory proof thereof, be cancelled by the officer having custody of the record thereof upon the order of the board of supervisors * * * with the written consent of the district attorney, city attorney or legal advisor of said board * * *". And further provided that "in the city and county of San Francisco the written consent of the city attorney shall have the same effect as the written consent of the district attorney."

Insofar as § 4986 Revenue and Taxation Code requires "written consent of the district attorney" or the "written consent of the city attorney" we do not believe that there have been any substantial changes made from the section as it read when it appeared in the Political Code. Furthermore, if the word "may" is to be read as "must" where a public body is concerned, and which has been so held by the California cases, [168] it would be inconsistent to provide that the district attorney or the city attorney had some veto power on the mandatory duty of the public body, which they might exercise by withholding their consent.

The above cited cases have not been overruled. As late as 1952 in *Southwestern Inv. Co., a corp. v. City of Los Angeles* 38 Cal. 2d 623, at 627, the court cited *City of Los Angeles v. Ford*, *supra*, as part of the recitation of facts, stating "At some time during the transactions delinquent taxes and penalties to the extent of about Thirty-two thousand were cancelled (see *City of Los Angeles v. Ford*, 12 Cal. 2d 407, 84 Pac. 2d 1042)."

As noted, *City of Los Angeles v. Board of Supervisors*, supra, contrued the word "may" to mean "must," and in doing so it relied on the *County of Los Angeles v. State*, supra. In 1954 in *Harless v. Carter*, 42 Cal. 2d 352, the Supreme Court reached a like interpretation as to the word "may" in another statute and quoted with approval at 357, from the *County of Los Angeles v. State*, supra.

If the effect of *Vista Irrigation District v. Board of Supervisors* [1948] 32 Cal. 2d 477 is to change the established rule, we think it is unfortunate and poorly considered. It is a one page decision. The case cited to the effect that the remedy of mandamus is unavailable is *Sherman v. Quinn*, 31 Cal. 2661, which was an action by a private party and not by a government agency.

Likewise *Security-First National Bank v. Board of Supervisors* [1950] 35 Cal. 2d 323, at 327, which cites *Vista*, also involved a bank, a private party.

The *Vista* case has caused confusion. 25 So. Cal. Law Review 395 at 403, "California Property Tax Trends," stated that a writ of mandamus would issue at the request of either a private or a governmental tax payer to enforce action by [169] the Board but after the *Vista* case, 27 So. Calif. Law Review page 415 at 436, "California Property Tax" states, "By recent decision however, this right no longer exists" citing *Sherman v. Quinn* and the *Vista* case. If the Supreme Court of California desired to turn its back on *City of Los Angeles v. Ford*, supra, and the other cases above cited they could have done it with more finesse than was done

in the Vista case. We are inclined to think that although a private party may no longer bring a writ of mandate, a public body may still proceed under the Ford case.

However, the authorities relied upon by the County of San Diego only go to the matter of remedy in the state courts and not to the matter of the right to the relief sought. They do not attack the proposition that there is a duty on the part of the Board of Supervisors to comply with § 4986 of the Revenue and Taxation Code, nor do the authorities relied upon by the defendant in any way detract from the holdings of the California courts that the word "may" in this section means "must" and that there is no discretion involved in the requested action of the Board of Supervisors.

We are not here concerned with a state remedy, we are concerned with a Federal remedy. Three alternatives suggest themselves as to a federal remedy, mandamus, injunction and summary judgment.

(1) Mandamus

The question before us is presently presented by the request for a mandatory order of this court requiring certain acts on the part of the Board of Supervisors, the District Attorney and the City Attorney, or in the alternative for a summary judgment against the County of San Diego upon its answer and supplemental answer, that it take nothing in this action. [170]

This district court has no primary jurisdiction in mandamus, *Petrowski v. Nutt* [9 Cir. 1947] 161

F. 2d 938. There are numerous Federal cases which hold that the district court may grant mandatory relief in the nature of mandamus "ancillary to jurisdiction independently conferred" or "in aid of its jurisdiction," or "necessary to the exercise of jurisdiction," Petrowski, (*supra*, page 939, and note 3). It could well be argued that this court has jurisdiction to grant mandatory relief requested on the following basis: This court has jurisdiction of this action in condemnation under 28 USCA § 1358, and that it has power under Title 40, USCA § 258(a) "to make such orders in respect of * * * liens * * * taxes * * * and other charges * * * as shall be just and equitable"; that a mandatory order in this proceeding would be ancillary to jurisdiction in the condemnation action, and in aid of its jurisdiction so acquired. Since we think relief may be otherwise granted, no useful purpose would be solved by pursuing this line of inquiry or analysing the case to determine the distinction, if any, between a right to exercise mandamus "ancillary to other jurisdiction" or "in aid of its jurisdiction," or "necessary to its jurisdiction."

Injunction

We think that this court has jurisdiction to grant an injunction restraining the County of San Diego, City of San Diego, Board of Supervisors, the District Attorney and the City Attorney from taking any steps to collect the taxes or assert any lien right in connection therewith.

We start with 28 USCA § 1341 [1948 Ed.] which

reads: "The district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The cases have expressly held however, [171] that the section is not applicable to the United States as plaintiff.

United States v. City of New York [2 Cir. 1949] 175 F. 2d 75.

United States v. Woodworth [2 Cir. 1948] 170 F. 2d 1019.

City of Springfield v. United States [1 Cir. 1938] 99 F. 2d 860.

United States v. Oklaloosa County, Fla. [D.C. Fla. 1945] 59 Fed. Supp. 426.

Although in *United States v. City of New York*, *supra*, the decree for an injunction issued below was reversed, the court did so based on the uncertainty in State law and footnoted the holding with "The situation would be different if the state courts had previously answered the question unequivocally." (Note 2). These cases demonstrate the use of injunction by the Federal Government to restrain assessment, levy or collection of State taxes in condemnation actions. Certainly the fact that the plaintiff seeks relief on pleadings speaking of mandamus, would not in itself prevent injunctive relief being granted. But we do not choose to grant injunctive relief, since we are granting the motion for summary judgment.

Summary Judgment

There is no dispute as to the facts and Rule 56 F.R.C.P. is applicable. Other defendants have participated at the hearing and have sought alternative relief under another code section for the cancellation of the taxes in question.

The California cases demonstrate that when request is made of the county authorities for cancellation of taxes under § 4986 Revenue and Taxation Code, and the request is in proper form no discretionary function exists in the county authorities. There is no need that the question as to the right of cancellation be raised only by mandamus. Here it is raised by motion for summary judgment. The motion for summary judgment is granted. [172]

Entry of a Final Judgment

Upon granting the motion for summary judgment the court does expressly "direct the entry of a final judgment * * * upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment" Rule 54(b) F.R.C.P.

To come within this section it must appear that there can be a final judgment upon one or more, but less than all the claims. We think the case of *Burkhard v. United States* [9 Cir.] 210 F. 2d 602 and *Burkhard v. United States* [9 Cir.] 1955, 227 F. 2d 659 involving condemnation, when read together, demonstrate that the claim for taxes is a claim suitable for a final judgment on compliance with Rule 54(b). It therefore would be appealable by the defendant, County of San Diego.

Motion by Other Defendants
Under § 1252.1 C.C.P.

§ 1252.1 C.C.P., relied upon by certain other defendants, seeking cancellation of taxes, was added by the statutes of 1953 ch. 1792, § 1. It was repealed by statutes of 1955, ch. 1229 § 1. The repeal was effective September 1, 1955. It was in effect on the date of taking viz, June 16, 1955.

We properly look to local law to determine “whether the local law permits apportionment of the taxes assessed,” *Collector of Revenue v. Ford Motor Company* [8 Cir. 1946] 158 F. 2d 354, 356. See *United States v. 25.936 Acres of Land* [D.C. N.J. 1944] 57 Fed. Supp. 383, reversed under the same name [3 Cir. 1946] 153 F. 2d 277, and remanded with instructions to retain jurisdiction to permit the parties to litigate the issue in the New Jersey courts, since “no New Jersey case has passed upon the precise question of law presented by the circumstances at bar.” (page 279). Thereafter in *Borough of Edgewater v. Corn Products Refining Co.* 136 N.J. Law 220, [173] 53 ATL 2d 212, the New Jersey court apportioned the taxes in accordance with a statute similar to § 1252.1 C.C.P.

The general intent of § 1252.1 C.C.P. is clear—to permit the apportionment of taxes for a fiscal year when a public agency takes property, said apportionment resulting in cancellation of taxes after the date of taking. It is a complicated statute and poorly drawn. It speaks of where a “public agency exempt from taxes is the plaintiff * * *”. This would include the United States. It contemplates a

final judgment of condemnation after a trial (the ordinary California practice) but has a proviso "in the event that an order permitting the plaintiff to take immediate possession was entered in such action" (which are the facts of this case, "prior to the payment of any taxes for the fiscal year during which the order was entered, the court shall, for such fiscal year," prorate the taxes to the date of such order for immediate possession.

The taxes for the year '55-'56 have not been paid, but the section speaks of the apportionment of taxes for the fiscal year "during which the order was entered." In our case this was the fiscal year 1954-55, since the taking was on June 16, 1955.

True, the amount ordered paid under such apportionment shall be in "lieu of all taxes current and delinquent, * * * and said judgment shall in addition to ordering said payment, order the cancellation, as of the date of the judgment, of all taxes current and delinquent * * *."

If the taking had been on July 10, 1955 for example, then all necessary elements under the section would exist. The taxes for 1955-56 would be unpaid and for that fiscal year the court would prorate to July 10, 1955. There would be payable taxes for those 10 days in July and all the remaining [174] taxes would be cancelled.

It's impossible to believe that the legislature intended this absurd result, but such is our reading of the statute. The statute however shows the general intent of the legislature to apportion taxes as of the date of taking and as such lends support to

our decision on the motion for summary judgment heretofore discussed.

The motion to strike from the answers of the County of San Diego is denied. [175]

[Endorsed]: Filed May 18, 1956.

United States District Court, Southern District
of California, Southern Division

No. 1506-SD-C Civil

UNITED STATES OF AMERICA,

Plaintiff,

v.

70.39 ACRES OF LAND, MORE OR LESS, SIT-
UATE IN THE CITY OF SAN DIEGO,
COUNTY OF SAN DIEGO, CALIFORNIA;
CITY OF SAN DIEGO, a municipal corpora-
tion; COUNTY OF SAN DIEGO, a body pol-
itic and corporate, et al., Defendants.

NUNC PRO TUNC FINAL JUDGMENT ON
ANSWER AND SUPPLEMENTAL AN-
SWER OF COUNTY OF SAN DIEGO
CLAIMING TAXES

It appearing to the Court that the Final Judg-
ment On Answer and Supplemental Answer of
County of San Diego Claiming Taxes, signed and
filed by the Court July 10, 1956 and entered July
16, 1956 is not correct and does not conform to the
minutes of the Court entered May 18, 1956 nor with

the Memorandum of the Court signed and filed on May 18, 1956 and that said judgment as signed and filed on July 10, 1956 contains errors arising from oversight and omission and the Court on its own initiative having on July 20, 1956 made and caused to be entered a minute order so finding and directed that the aforesaid judgment and the Findings of Fact, and Conclusions of Law supporting said judgment be [176] amended nunc pro tunc as of July 10, 1956 to make the same conform to the said Minute Order entered May 18, 1956 and said Opinion signed and filed May 18, 1956 and directing that Amended Findings of Fact, Conclusions of Law and Judgment be drawn for the aforesaid purpose.

It Is Hereby Ordered, Adjudged and Decreed that the said Findings of Fact, Conclusions of Law and Judgment signed and filed July 10, 1956 and entered July 16, 1956 be and the same is hereby corrected and amended nunc pro tunc as of July 10, 1956 to conform to the actual opinion announced and rendered by the Court on May 18, 1956 and the said Minute Order of the Court entered May 18, 1956, said amended Findings of Fact, Conclusions of Law and Judgment to read as follows:

This cause coming on to be heard the 12th day of April, 1956, at the hour of 10:00 o'clock A.M., before Honorable James M. Carter, United States District Judge, at San Diego, California, pursuant to the Order to Show Cause issued upon Motion of plaintiff United States of America, filed March 19, 1956, and the Motion of defendants Charles W. Carlstrom, also known as C. W. Carlstrom, The

Salvation Army, a California corporation, The Salvation Army, a New York corporation, the Southern California District Council of the Assemblies of God, Inc., a non-profit corporation, and the Southern California Children's Aid Foundation, Inc., a non-profit corporation, for an order to strike paragraph 3 of the Answer of said County of San Diego filed August 10, 1955 and paragraph 1 of the Supplemental Answer of said defendant filed January 3, 1956, which said Motion to Strike was joined in at said hearing by Defendant, Midway [177] Properties, and it having been stipulated by the City of San Diego and the County of San Diego, through their respective counsel, that if one defendant owner was entitled to relief under said Motion to Strike that the same relief should inure to the benefit of all defendants who have a fee interest in the property being condemned by plaintiff in this action, the plaintiff being represented by Laughlin E. Waters, United States Attorney, and George F. Hurley, Assistant United States Attorney, and the County of San Diego appearing by James Don Keller, District Attorney and County Counsel for the County of San Diego, and Duane J. Carnes, Deputy County Counsel, who appeared also for and on behalf of the Board of Supervisors of said county, and in their official capacities as officers of said county, and the City of San Diego appearing by Jean F. DuPaul, City Attorney, and Robert T. Sjogren, Deputy City Attorney, and appearing also defendant Charles W. Carlstrom, personally and by Hill, Farrer and Burrill, by Stanley S. Burrill and

Albert J. Day, his attorneys, Midway Properties Company, a limited partnership, by Levenson, Levenson and Block, by Eli Levenson, their attorneys, and Ace Van and Storage Company, Inc., by Eli Levenson, who appeared upon this motion for its attorneys, Southern California Children's Aid Foundation and Southern California District Council of the Assemblies of God, Inc., by Paul, Hastings and Janofsky, by Leonard S. Janofsky, their attorneys, The Salvation Army, a New York corporation, and The Salvation Army, a California corporation, by Rubin and Seltzer, [178] by Norman T. Seltzer, their attorneys, Lyon Van and Storage Company, a corporation, by Gray, Cary, Ames and Frye, by Alfred Lord, its attorneys, and General Dynamics Corporation, Convair Division, by Thomas J. Moran, its attorney, and it appearing to the Court that all parties interested in said motion of plaintiff and said motion to strike of said defendants have been duly and properly notified of the pendency of this hearing, and the cause having been submitted to it by the parties upon such Answer, Supplemental Answer, and the Motion of plaintiff, together with affidavits in support thereof with respect thereto, and upon such Motion to Strike of said defendants, and the Court having examined the records on file in this case, including said Answer and Supplemental Answer of defendant County of San Diego and the affidavits attached to the said Motion of the plaintiff for cancellation of the taxes described in said Supplemental Answer and Motion to Strike, the Court proceeded to hear

the statements of counsel and to consider the evidence in support of said Motion, and it appearing to the Court from said Motion of the plaintiff, and the affidavits and verified pleadings attached thereto, and the answers and memoranda of the parties filed herein, and said Motion to Strike of said defendants, that there is no dispute, issue or controversy among the parties as to the facts involved in the matters and issues presented by said respective Motions, and the Court having heard the arguments of counsel and being fully informed in the premises, and the cause having been submitted to the Court for determination and the Court having filed, on May 18, 1956, its memorandum [179] upon the matter so submitted, and this cause having come on further to be heard on the date hereof, upon the Motion of plaintiff for the entry of Final Judgment pursuant to Rules 54(b) and 56 of the Federal Rules of Civil Procedure and pursuant to the direction of the Court in its said Memorandum filed May 18, 1956, now, upon application by plaintiff for summary judgment in accordance with the terms and conditions as set forth by the Court in its said memorandum, and the Court, having determined that due notice of this hearing has been given all parties first above named being present, the Court having again heard counsel and being fully informed in the premises, makes the following

Findings of Fact

I.

That the first Monday of March in the year 1955 fell on March 7, 1955.

II.

The United States of America acquired the full fee simple title to all of the property involved in this controversy on June 16, 1955, by filing its Declaration of Taking on said date.

III.

That on June 20, 1955, the United States of America recorded its Declaration of Taking of the property subject to said 1955-1956 general taxes in conformity with the laws of the State of California governing the recording of documents evidencing title to real property;

That the certified copy of said Declaration of Taking, filed as aforesaid, disclosed the date of [180] acquisition of the property acquired and the public purpose for which said property was being acquired.

IV.

That on November 4, 1955, following the filing of Supplemental Answer of defendant County of San Diego, the plaintiff United States of America, in pursuance of the provisions of Sections 4986 and 4986.2 of the Revenue and Taxation Code of the State of California, made application to the Board of Supervisors of the County of San Diego for cancellation of the current taxes for the fiscal year 1955-1956;

That said application duly and fully showed upon its face that it was made after lien date for the taxes described by reference to the Declaration of Taking and for a public use which would exempt said

property from taxation under United States laws;

That said application was duly received by the Board of Supervisors of San Diego County, and was referred to the District Attorney of San Diego County for consent to the granting of same.

V.

That the said Board of Supervisors of San Diego County, on January 10, 1956, denied the petition of the plaintiff for cancellation of said taxes.

VI.

That on March 7, 1955, and continuously from said date, there was in full force and effect Article XIII of the Constitution of the State of California, Section 1 of which reads, in part, as follows:

“All property in the state except as otherwise in this Constitution provided not exempt under the laws of the United States, should be taxed [181] in proportion to value * * *”

and Section 8 of which reads, in part, as follows:

“The legislature shall, by law, require each taxpayer in this state to make and deliver to the County Assessor annually, a statement, under oath, setting forth specifically all the real and personal property owned by such taxpayer, or in his possession, or under his control, at 12 o'clock meridian on the first Monday of March.”

The provisions of said Constitution above-quoted have not been amended, modified or repealed since March 7, 1955.

VII.

That on March 7, 1955, and continuously thereafter to and including the date hereof, there have been in full force and effect Sections 2192, 4986 and 4986.2, of the Revenue and Taxation Code of the State of California, which sections read as follows:

§ 2192. Time of Attachment of Liens.

All Tax Liens attach annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied.

§ 4986. Cancellation of Taxes, Etc.: Authority to Cancel: "Property Acquired" Defined: Consent of City Attorney: Cancellation Under Sub-paragraph (g).

All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be canceled by the auditor on [182] order of the board of supervisors with the written consent of the district attorney if it was levied or charged.

* * * (f) On property acquired after the lien date by the United States of America if such property, upon such acquisition, becomes exempt from taxation under the laws of the United States.

No cancellation under subparagraphs * * * (f) * * * of this section shall be made in respect of all or any portion of any taxes, penalties or costs attached thereto, collectible by county officers on behalf of a municipal corporation, without the written consent of the city attorney thereof.

§ 4986.2 Same: City Taxes: Procedure. All or

any portion of uncollected city taxes, penalties or costs may be cancelled on any of the grounds specified in Section 4986. If the city taxes are collected by the county, the procedure outlined in Section 4986 for the cancellation of taxes, penalties, or costs, shall be followed, except that the consent of the city attorney, in lieu of the consent of the district attorney, is necessary before cancellation * * *.

The provisions of the statutes above quoted have not been amended, modified or repealed since March 7, 1955. [183]

VIII.

That at all times herein mentioned the tax fiscal year commenced on the first day of July.

IX.

That on June 16, 1955 there was in full force and effect Section 1252.1 of the California Code of Civil Procedure reading as follows:

"1252.1 (Taxes, penalties, costs: Computation: Payment from award.) At the time of commencement of the trial of any condemnation action in which a public agency exempt from taxes is the plaintiff, the clerk of the court shall serve upon the officer or officers responsible for the computation of all ad valorem taxes on the property being condemned, written notice to prepare and file with the clerk of the court a certificate of all delinquent taxes, penalties and costs, and of all current taxes, due and payable on said property as of the date said notice was served. There shall be filed by the clerk with the court, as part of the records in said action,

a copy of said written notice with the acknowledgment of service and the date thereof endorsed thereon by the officer so served. For the purposes of this section, the term taxes shall include ad valorem special assessments levied and collected in the same manner as other taxes. In the event said notices are served at a time when the amount of the current taxes, which are a lien on the property but not yet payable, are not known to the certifying officers, said certificates shall [184] contain, in lieu of a statement of the current taxes, a statement based on (1) the assessed value for the current year of the property being condemned, and (2) the tax rate for the previous fiscal year. Said certificates shall be filed with the clerk of the court, as a part of the records and files of said condemnation action, within 10 days after the service of said notices, and in the event of failure on the part of any officer upon whom such notice is served to file said certificates within said time, it shall be conclusively presumed that as to the taxes for the collection of which such officer is responsible, no taxes are due and payable on said property, or in any manner constitute a lien thereon.

Before making any final order of condemnation in such action, the court shall determine whether said certificates have been filed by all officers upon whom the notices have been served. If said certificates have been filed, the court shall as a part of the judgment direct the payment to the tax collecting agencies, out of the award, the amounts of the delinquent taxes, penalties and costs, and the

amounts of the current taxes, shown by said certificates to be due and payable. In the event said certificates show that the amounts of the current taxes which are a lien are not known, and in lieu of the statement of current taxes contain a statement based on the assessed value for the current year and the tax rate for the previous year, the court shall [185] in lieu of directing the payment of current taxes order the payment of sums bearing the same relation to the amounts shown in said statements as the portion of the current fiscal year from the commencement thereof to the date of the final order of condemnation bears towards an entire fiscal year; provided, that in the event an order permitting the plaintiff to take immediate possession was entered in such action, prior to the payment of any taxes for the fiscal year during which said order was entered, the court shall, for such fiscal year, order the payment of a sum bearing the same relation to the amount of the taxes for such fiscal year, or in the event said amount is not known, to the amount shown in said statement based on the assessed value for the current year and the tax rate for the previous year, as the portion of such fiscal year from the commencement thereof to the date of entry of such order of immediate possession bears towards an entire fiscal year.

In any such action, the payment of the sums ordered by the court to be paid shall be considered to be in lieu of all taxes, current and delinquent, and all penalties and costs, due and payable with respect to the property being condemned, and said

judgment shall, in addition to ordering said payments, order the cancellation, as of the date of the judgment, of all taxes, current and delinquent, and all penalties and costs, on said property. Said judgment shall be conclusively binding on all tax collecting [186] agencies upon which the notices were duly served by the clerk of the court.

The subject of the amount of the taxes which may be due on any property shall not be considered relevant on any issue in any such condemnation action, and the mention of said subject, either in the voir dire examination of jurors, or during the examination of witnesses, or as a part of the court's instructions to the jury, or in argument of counsel, or otherwise, shall constitute grounds for a mistrial in any such action. (Added by Stats. 1953, ch. 1792, § 1.) (Repealed by Stats. 1955, ch. 1229, § 1, effective September 7, 1955.)

X.

The Court expressly finds and determines that there is no just reason for delay in entering a final judgment upon the claims of the County of San Diego for and on behalf of itself, the City of San Diego and school district for taxes as set forth in its said answer and supplemental answer and the objections thereto by plaintiff and said defendants. That said claim for taxes and objections thereto are suitable for final judgment within the provisions of Section 54(b) of Federal Rules of Civil Procedure and constitutes one of several claims within the meaning of said section but does not constitute all the claims in the above-entitled proceedings.

And, from such findings of fact, the court makes the following [187]

Conclusions of Law

I.

That this court has jurisdiction of the parties hereto by their appearances in this action and of the subject matter of this controversy by virtue of the provisions of the Constitution of the United States of America, Title 28, U.S.C., and Title 40, U.S.C., Section 258a.

II.

That the legal effect of the provisions of the Constitution of the State of California in force and effect at the time the plaintiff made its said application for cancellation of taxes, and also of Sections 2192, 4986 and 4986.2, of the Revenue and Taxation Code of said state, was to establish in said plaintiff the right to relief prayed for in its Motion.

III.

That the petition of the plaintiff for cancellation of the current taxes for the fiscal year 1955-1956, was drawn in due form of law and was fair on its face and fully complied by its terms with the provisions of the Constitution of the State of California.

IV.

That the property acquired by the United States by its Declaration of Taking and deposit into the registry of the estimated compensation, as provided by Section 258a of Title 40 of the United States

Code, was for, and in aid of, the national defense, and was a use which exempted it from taxation under United States law.

V.

That the Board of Supervisors of the County of San [188] Diego acted wrongfully and without authority of law, and in contravention of the duty imposed upon it by the statutes of the State of California in refusing to grant said petition of plaintiff for cancellation of the taxes.

VI.

That the City of San Diego, having appeared in this action and ratifying the acts of the Board of Supervisors in the premises, is not entitled to assert any rights with respect to said taxes other than those asserted by the said County of San Diego, by and through its District Attorney and County Counsel, and the said County of San Diego, having appeared in this action by filing its Answer and Supplemental Answer, and having participated in the hearing with respect to the issues raised by said Answer and Supplemental Answer, is bound by the judgment to be entered hereon, and the court has jurisdiction of said defendants City of San Diego, County of San Diego, the Board of Supervisors of said County of San Diego, and the City Attorney of the City of San Diego in their official capacities and may, therefore, enter judgment (1) against them, and each of them, upon said Answer and Supplemental Answer, and upon the Motion of

the plaintiff United States of America for cancellation of the 1955-1956 general taxes, and (2) in favor of the County of San Diego as to the delinquent taxes in the amount of \$54.23, against Tract A-100, as described in the Supplemental Answer of the defendant County of San Diego, which the parties agree may be paid out of the deposit.

VII.

That the legal effect of cancellation of the [189] general taxes on application of the United States of America is to extinguish the lien of the general taxes for all purposes and bar recovery thereof by the County of San Diego, either by sale of the land described in its said Answer and Supplemental Answer, or by attachment of the fund on deposit in the registry of the court, or by legal process against plaintiff or any of the defendant owners on March 7, 1955 or the successors in interest thereof.

That the plaintiff and all parties defendant in the above action who had interests at date of taking in any of the property described in the defendant County of San Diego's Answer and Supplemental Answer are entitled to judgment that said County of San Diego take nothing by its said Answer and Supplemental Answer and barring any recovery against the said real property or the fund now on deposit in the registry of the court, or any additional funds deposited on account of just compensation for the property taken in condemnation by this action, or against the interests of any of the defendants to this action in said deposited fund,

as aforesaid, or against the said defendants or any of them personally or otherwise, to recover any portion of the taxes alleged to be due in and by the said Answer and Supplemental Answer, except, however, that the said defendant County of San Diego shall be entitled to judgment for the sum of \$54.23, which is the amount of delinquent taxes against Tract A-100, as set forth in its said Answer and Supplemental Answer.

VIII.

The Court concludes that the said defendants are not entitled to relief under the provision of Section [190] 1252.1 of the California Code of Civil Procedure.

IX.

The Court expressly determines pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason for delay in entering a final judgment on the said claims of the County of San Diego and the said objections thereto and expressly directs the entry of a final judgment upon said claims and objections thereto.

Now, Therefore, upon the foregoing Findings of Fact and Conclusions of Law

It Is Hereby Ordered, Adjudged and Decreed

I.

That judgment be, and the same is, hereby entered in favor of the County of San Diego upon its Answer and Supplemental Answer, in the sum of \$54.23, being the amount of the delinquent taxes levied against Tract A-100 as the same is described

in the Second Amendment to First Amended Complaint in Condemnation, and the clerk of this court is hereby directed to disburse, from funds on deposit in the registry of this court, the said sum of \$54.23, to the County of San Diego, as collector of taxes for said County of San Diego and the said City of San Diego, for distribution by it in the manner provided by the laws of the State of California.

II.

That judgment be, and the same is, hereby entered against the County of San Diego and in favor of plaintiff and the other defendants above named, that it, the said County of San Diego, taking nothing by this action with respect to the claim filed by it for taxes for the fiscal year 1955-1956, as set forth in its said Answer [191] and Supplemental Answer, and the plaintiff and all of the defendants above named shall go hence with respect to said claim, without day, free and clear of all claims, demands or charges of any nature, character or description whatsoever, which the said defendant County of San Diego could or might assert against said plaintiff and said defendants on account of said taxes, or against the property identified and described in the Declaration of Taking on file in this action, or against the funds on deposit in the registry of this court, or to be hereafter deposited, as described above; and the rights and interests of all of the defendants to this action having any interest in said deposits into the registry of the court made pursuant to any judgment in this court

fixing just compensation, are free and clear of all claims, demands or charges of any nature, character or description whatsoever, which the defendant County of San Diego could or might assert against said defendants, or any of them, or against their respective shares of the aforesaid deposits into the registry of the court, or against the avails of any judgment in their favor fixing just compensation for the condemnation and taking of their interests in the real estate identified and described in the said Second Amendment to First Amended Complaint in Condemnation and in the Declaration of Taking on file in this action.

III.

That the said motion of defendants to strike portions of the Answer and Supplemental Answer of the County of San Diego is hereby denied.

IV.

The Court hereby expressly orders and directs [192] the entry of the within final judgment upon the said claims of the County of San Diego and the objections thereto.

V.

That these Findings of Fact, Conclusions of Law and Final Judgment be made nunc pro tunc as of July 10, 1956.

Dated: This 25th day of July, 1956, nunc pro tunc as of July 10, 1956.

/s/ JAMES M. CARTER,

United States District Judge.

Presented by:

LAUGHLIN E. WATERS,
United States Attorney,
JOSEPH F. McPHERSON,
GEORGE F. HURLEY,
Assistant U. S. Attorneys,
/s/ By GEORGE F. HURLEY,
Attorneys for Plaintiff.

[Endorsed]: Filed July 25, 1956. Docketed and
Entered July 26, 1956. [193]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that County of San Diego and City of San Diego, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the nunc pro tunc final judgment on Answer and Supplemental Answer of County of San Diego claiming taxes entered in this action on July 26, 1956 nunc pro tunc as of July 10, 1956.

JAMES DON KELLER,
District Attorney,
/s/ By DUANE J. CARNES,
Deputy,
/s/ By CARROLL H. SMITH,
Deputy,

JEAN F. DuPAUL,

City Attorney,

/s/ By ROBERT T. SJOGREN,

Deputy,

Attorneys for County of San Diego
and City of San Diego. [194]

Affidavit of Service by Mail Attached. [195]

[Endorsed]: Filed Aug. 22, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Charles W. Carlstrom, also known as C. W. Carlstrom, Southern California Children's Aid Foundation, Inc., a California non-profit corporation, Southern California District Council of the Assemblies of God, Inc., a non-profit corporation, The Salvation Army, a California corporation, and The Salvation Army, a New York corporation, and each of them, defendants above named, hereby jointly appeal to the United States Court of Appeals for the Ninth Circuit from that portion of the Nunc Pro Tunc Final Judgment on Answer and Supplemental Answer of County of San Diego Claiming Taxes, entered in the above entitled action on July 26, 1956 nunc pro tunc as of July 10, 1956, appearing in paragraph III on page 17, lines 28 to 31 inclusive of said judgment, adjudicating and decreeing that said defendants, and each of them, are not entitled to relief under

the provisions of Section 1252.1 of the California Code of Civil Procedure, and denying the motion of said defendants, and each of them, to strike portions of the Answer and Supplemental Answer of the County of San Diego.

Dated: This 31st day of August, 1956.

HILL, FARRER & BURRILL,

/s/ By ALBERT J. DAY,

Attorneys for Charles W. Carlstrom.

PROCOPIO, PRICE, CORY &

SCHWARTZ,

PAUL, HASTINGS & JANOFSKY,

/s/ By LEONARD S. JANOFSKY,

Attorneys for Children's Aid. [197]

PAUL, HASTINGS & JANOFSKY,

/s/ By LEONARD S. JANOFSKY,

Attorneys for Assemblies.

RUBIN & SELTZER,

/s/ By NORMAN T. SELTZER,

Attorneys for The Salvation Army.

Affidavit of Service Attached. [199]

[Endorsed]: Filed Sept. 5, 1956. [198]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Appellants herein state as their points on appeal the following:

1. The trial court erred in denying taxing agencies any recovery in an action where the taxes be-

came a lien as of the first Monday in March, 1955, the United States took title June 16, 1955 and where there has not at this date been a payment out of the deposit in court.

2. The trial court erred in construing California Revenue and Taxation Code Section 4986 as giving the United States the right to compel a cancellation not only of taxes of record against real property but also to defeat the right of taxing [201] agencies to payment of their tax demands out of deposits in court in a condemnation proceeding.

3. The trial court erred in holding that the United States has a sufficient or any interest in the deposit in court in a condemnation award to enable it to intervene in a dispute between the defendants as to ownership or beneficial rights in such fund.

JAMES DON KELLER,

District Attorney,

/s/ By DUANE J. CARNES,

Deputy,

/s/ By CARROLL H. SMITH,

Deputy,

JEAN F. DuPAUL,

City Attorney,

/s/ By ROBERT T. SJOGREN,

Deputy,

Attorneys for County of San
Diego and City of San Diego.

[Endorsed]: Filed Sep. 5, 1956.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Clerk of the Above Entitled Court:

Defendants and appellants, County of San Diego and City of San Diego hereby request that the following portions of the Clerk's file be set forth in the record on appeal.

(1) First Amended Complaint in Condemnation.

(2) Answer of County of San Diego (filed August 10, 1955).

(3) Supplemental Answer of County of San Diego.

(4) Motion of Plaintiff for a Rule to Show Cause Directed to the District Attorney and the Board of Supervisors of San Diego County, and the City Attorney of the City of San Diego, with respect to cancellation of taxes, or, in the alternative, for summary judgment that said County take nothing by its answer. [203]

(5) Memorandum Decision (filed May 18, 1956).

(6) Nunc pro tunc Final Judgment on Answer and Supplemental Answer of County of San Diego Claiming Taxes.

(7) Notice of Appeal.

(8) Statement of Points on Appeal.

JAMES DON KELLER,

District Attorney,

/s/ By DUANE J. CARNES,

Deputy,

/s/ By CARROLL H. SMITH,

Deputy,

JEAN F. DU PAUL,

City Attorney,

/s/ By ROBERT T. SJOGREN,

Deputy,

Attorneys for County of San
Diego and City of San Diego.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Sep. 5, 1956.

[Title of District Court and Cause.]DESIGNATION BY PLAINTIFF OF ADDI-
TIONAL CONTENTS OF RECORD ON
APPEAL

To the Clerk of the above-entitled Court:

Plaintiff and appellee, the United States of America, hereby requests that the following portions of the clerk's file, in addition to the portions designated by defendants and appellants, County of San Diego and City of San Diego, filed August 31, 1956, be set forth in the record on appeal:

1. Amendment to First Amended Complaint filed August 23, 1955;

2. Declaration of Taking filed June 16, 1955.

LAUGHLIN E. WATERS,

United States Attorney,

JOSEPH F. McPHERSON,

GEORGE F. HURLEY,

Assistant U. S. Attorneys,

/s/ By GEORGE F. HURLEY,

Attorneys for Plaintiff United

States of America. [205]

Affidavit of Mailing attached. [206]

[Endorsed]: Filed Sep. 13, 1956.

[Title of District Court and Cause.]

DESIGNATION BY DEFENDANTS AND AP-
PELLANTS OF ADDITIONAL CONTENTS
OF RECORD ON APPEAL

To the Clerk of the above entitled Court:

Defendants and appellants Charles W. Carlstrom, also known as C. W. Carlstrom, Southern California Children's Aid Foundation, Inc., a California non-profit corporation, Southern California District Council of the Assemblies of God, Inc., a non-profit corporation, The Salvation Army, a California corporation, and The Salvation Army, a New York corporation, and each of them, hereby requests that the following portions of the Clerk's file (in addition to the portions designated by defendants and appellants County of San Diego and City of San Diego, filed August 31, 1956, and in addition to the

portions designated by plaintiff and appellee, the United States of America, filed on or about September 14, 1956) be set forth in the record on appeal:

1. Motion to Strike of the above named defendants and appellants, which said Motion was filed April 12, 1956, together with points and authorities in support of said Motion attached thereto and filed concurrently therewith.

Dated: This 18th day of September, 1956.

HILL, FARRER & BURRILL,
/s/ By STANLEY S. BURRILL,
Attorneys for Charles W. Carlstrom.

PROCOPIO, PRICE, CORY &
SCHWARTZ,
PAUL, HASTINGS & JANOFSKY,
/s/ By LEONARD S. JANOFSKY,
Attorneys for Children's Aid.

PAUL, HASTINGS & JANOFSKY,
/s/ By LEONARD S. JANOFSKY,
Attorneys for Assemblies.

RUBIN & SELTZER
/s/ By NORMAN T. SELTZER, Per B.
Attorneys for The Salvation
Army. [208]

Affidavit of Mailing attached.

[Endorsed]: Filed Sep. 19, 1956.

[Title of District Court and Cause.]

CONCISE STATEMENT OF
POINTS ON APPEAL

Appellants and defendants, C. W. Carlstrom, Southern California Children's Aid Foundation, Inc., a California non-profit corporation, Southern California District Council of the Assemblies of God, Inc., a non-profit corporation, The Salvation Army, a California corporation, and The Salvation Army, a New York corporation, and each of them, herein state as their concise points on which they intend to rely on appeal the following:

1. Where the record is undisputed that title and possession to the real property being condemned herein passed to the United States of America upon the filing of the Declaration of Taking on June 16, 1955, the Trial Court erred in holding that the language and intent of Section 1252.1 of the California Code of Civil Procedure did not require the cancellation of county and city ad valorem taxes on said real property for the fiscal year commencing after the filing of said Declaration of Taking, i. e. commencing July 1, 1955, even though said taxes became a lien on the said property on March 7, 1955.

2. The Trial Court erred in decreeing that the defendant property owners are not entitled to relief under the provisions of Section 1252.1 of the California Code of Civil Procedure in denying said defendants' Motion to Strike from the Answer of the County of San Diego the claims relating to taxes

for the fiscal year commencing subsequent to the passage of title and possession to the United States of America.

Dated: This 18th day of September, 1956.

HILL, FARRER & BURRILL,
/s/ By STANLEY S. BURRILL,
Attorneys for C. W. Carlstrom.
PROCOPIO, PRICE, CORY &
SCHWARTZ and PAUL, HAST-
INGS & JANOFSKY,
/s/ By LEONARD S. JANOFSKY,
Attorneys for Children's Aid.
PAUL, HASTINGS & JANOFSKY,
/s/ By LEONARD S. JANOFSKY,
Attorneys for Assemblies.
RUBIN & SELTZER,
/s/ By NORMAN T. SELTZER, Per B.,
Attorneys for The Salvation Army.

Affidavit of Mailing Attached.

[Endorsed]: Filed Sep. 19, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 217, inclusive, contain the original

First Amended Complaint in Condemnation;

Declaration of Taking;

Answer and Appearance of defendant County of San Diego to first amended complaint;

Amendment to First Amended Complaint in Condemnation;

Supplemental Answer of defendant County of San Diego;

Motion of Plaintiff for a Rule to Show Cause Directed to the District Attorney and the Board of Supervisors of San Diego County, and the City Attorney of the City of San Diego, with Respect to Cancellation of Taxes, or, in the Alternative, for summary judgment that said County take Nothing by its Answer;

Motion to Strike by defendants Carlstrom, et al., with points and authorities in support;

Memorandum;

Nunc Pro Tunc Final Judgment on Answer and Supplemental Answer of County of San Diego Claiming Taxes;

Notice of Appeal by defendants County of San Diego and City of San Diego;

Notice of Appeal by defendants Carlstrom, et al.;

Statement of Points on Appeal by defendants County of San Diego and City of San Diego;

Designation of Contents of Record on Appeal by defendants County of San Diego and City of San Diego;

Designation by Plaintiff of Additional Contents of Record on Appeal;

Designation by defendants and appellants (Carlstrom, et al.) of additional contents of Record on Appeal;

Concise Statement of Points on Appeal by defendants Carlstrom, et al.;

Order Extending Time for Filing Record on Appeal and Docketing Appeal;

which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above entitled case.

I further certify that my fees for preparing the foregoing record amount to \$1.60, which sum has been paid by appellant County of San Diego.

Witness my hand and seal of the said District Court this 6th day of November, 1956.

[Seal] JOHN A. CHILDRESS,
 Clerk,

/s/ By E. M. ENSTROM, JR.,
 Deputy Clerk.

[Endorsed]: No. 15352. United States Court of Appeals for the Ninth Circuit. County of San Diego and City of San Diego, Appellants, vs. United States of America, Appellee. Charles W. Carlstrom, Southern California Children's Aid Foundation, Inc., a corporation, Southern California District Council of The Assemblies of God, Inc., a corporation and The Salvation Army, Appellants, vs. County of San Diego, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Southern Division.

Filed: November 7, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15352

United States of America, Plaintiff, vs. 70.39
Acres of Land, More or Less, Situate in the City of
San Diego, County of San Diego, California; County
of San Diego, a political subdivision of the State of
California, and The City of San Diego, a municipal
corporation, et al., Defendants.

Charles W. Carlstrom, also known as C. W. Carlstrom, Southern California Children's Aid Foundation, Inc., a California non-profit corporation, Southern California District Council of the Assemblies of God, Inc., a non-profit corporation, The Salvation Army, a California corporation, and The Salvation Army, a New York corporation, Cross Appellants and Appellees, vs. County of San Diego, a political subdivision of the State of California, and The City of San Diego, a municipal corporation. Appellants and Cross Appellees.

CONCISE STATEMENT OF
POINTS ON APPEAL

Now come Charles W. Carlstrom, also known as C. W. Carlstrom, Southern California Children's Aid Foundation, Inc., a California non-profit corporation, Southern California District Council of The Assemblies of God, Inc., a non-profit corporation, The Salvation Army, a California corporation, and

The Salvation Army, a New York corporation, Cross Appellants and Appellees, and adopt the Concise Statement of Points on Appeal, filed in the District Court and appearing at page 211 of the original certified typewritten Record on Appeal herein as the Concise Statement of Points on Appeal upon which they intend to rely on this appeal.

Dated: November 14, 1956.

HILL, FARRER & BURRILL,

/s/ By STANLEY S. BURRILL,

Attorneys for Charles W. Carlstrom.

PROCOPIO, PRICE, CORY &
SCHWARTZ,

PAUL, HASTINGS & JANOFSKY,

/s/ By LEONARD S. JANOFSKY,

Attorneys for Children's Aid.

PAUL, HASTINGS & JANOFSKY,

/s/ By LEONARD S. JANOFSKY,

Attorneys for Assemblies.

RUBIN & SELTZER,

/s/ By NORMAN T. SELTZER,

Attorneys for The Salvation Army.

Affidavit of Mailing attached.

[Endorsed]: Filed Nov. 15, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL CONTENTS
OF RECORD ON APPEAL

Now come Charles W. Carlstrom, also known as C. W. Carlstrom, Southern California Children's Aid Foundation, Inc., a California non-profit corporation, Southern California District Council of The Assemblies of God, Inc., a non-profit corporation, The Salvation Army, a California corporation, and The Salvation Army, a New York corporation, Cross Appellants and Appellees, and adopt the Designation by Defendants and Appellants of Additional Contents of Record on Appeal, filed in the District Court and appearing at page 207 of the original certified typewritten Record on Appeal herein, as the additional Designation of the Record which is material to the consideration of this Appeal and Cross Appeal.

In addition to the foregoing said Cross Appellants and Appellees request the Clerk of the above entitled Court to cause to be printed as part of the record the following additional documents.

- (1) Concise Statement of Points on Appeal.
- (2) Designation of Additional Contents of Record on Appeal.

Dated: November 14, 1956.

HILL, FARRER & BURRILL,
/s/ By STANLEY S. BURRILL,
Attorneys for Charles W. Carlstrom.

PROCOPIO, PRICE, CORY &
SCHWARTZ,

PAUL, HASTINGS & JANOFISKY,

/s/ By LEONARD S. JANOFISKY,
Attorneys for Children's Aid.

PAUL, HASTINGS & JANOFISKY,

/s/ By LEONARD S. JANOFISKY,
Attorneys for Assemblies.

RUBIN & SELTZER,

/s/ By NORMAN T. SELTZER,
Attorneys for The Salvation Army.

Affidavit of Mailing attached.

[Endorsed]: Filed Nov. 15, 1956. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL

To the Clerk of the above entitled Court:

Defendants and appellants, County of San Diego
and The City of San Diego, hereby adopt as State-
ment of Points on Appeal that statement heretofore
filed by them in the United States District Court
and which is contained in the transcript of record.

JAMES DON KELLER,

District Attorney,

/s/ By DUANE J. CARNES,
Deputy,

/s/ By CARROLL H. SMITH,
Deputy,

JEAN F. DuPAUL,
City Attorney,
/s/ By ALAN M. FIRESTONE,
Deputy,
Attorneys for County of San
Diego and The City of San
Diego.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD

To the Clerk of the above entitled Court:

Defendants and appellants, County of San Diego and The City of San Diego, hereby adopt as Designation of Contents of Record on Appeal that designation heretofore filed by them in the United States District Court and which is contained in the transcript of record.

JAMES DON KELLER,
District Attorney,
/s/ By DUANE J. CARNES,
Deputy,
/s/ By CARROLL H. SMITH,
Deputy,
JEAN F. DuPAUL,
City Attorney,
/s/ By ALAN M. FIRESTONE,
Deputy,
Attorneys for County of San
Diego and The City of San
Diego.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 15, 1956. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION RE OWNERSHIP

Whereas, The United States of America, The County of San Diego, a body politic and corporate, The City of San Diego, a municipal corporation, Charles W. Carlstrom, also known as C. W. Carlstrom, The Southern California Children's Aid Foundation, Inc., a California non-profit corporation, The Southern California District Council of The Assemblies of God, Inc., a non-profit corporation, The Salvation Army, a California corporation, and The Salvation Army, a New York corporation, and each of them, desire to delete from the joint Record on Appeal in the above entitled matter the property descriptions and the list of the owners or persons claiming interest in the property sought to be condemned for the purpose of reducing the record and saving expense; and

Whereas, the ownership of various parcels is in conflict and the United States District Court, Southern District of California, Southern Division, has made and will hereinafter make various rulings in connection with said ownership; and

Whereas, this appeal is taken from the Nunc Pro Tunc Final Judgment on Answer and Supplemental Answer of County of San Diego Claiming Taxes, entered on July 26, 1956 nunc pro tunc as of July 10, 1956, and is solely concerned with the cancellation of the taxes for the fiscal year 1955-1956 upon the property condemned; and

Whereas, it is the desire of said parties, and each of them, in order to perfect the joint record on appeal, to stipulate for the purpose of said appeal only as to the ownership of the various parcels whereon said taxes were cancelled, without, however, waiving the position of said parties, or any of them, as to their various contentions concerning the ownership of said parcels or their right to subsequently appeal from any ruling or rulings hereinbefore or hereinafter made by said United States District Court subsequent to said Nunc Pro Tunc Final Judgment on Answer and Supplemental Answer of County of San Diego Claiming Taxes, as to the ownership of said parcels.

Now, Therefore, It Is Hereby Stipulated by and between The United States of America, The County of San Diego, a body politic and corporate, The City of San Diego, a municipal corporation, Charles W. Carlstrom, also known as C. W. Carlstrom, The Southern California Children's Aid Foundation, Inc., a California non-profit corporation, The Southern California District Council of The Assemblies of God, Inc., a non-profit corporation, The Salvation Army, a California corporation, and The Salvation Army, a New York corporation, through their respective counsel, the undersigned, that for the sole purpose of this appeal from the Nunc Pro Tunc Final Judgment on Answer and Supplemental Answer of County of San Diego Claiming Taxes the following parties shall be deemed, at all times material to the determination of this appeal, the fee own-

ers of the parcels set forth above their names, as follows:

Ownership Tract A-101: The Salvation Army, a California corporation, and The Salvation Army, a New York corporation, each an undivided one-half interest.

Ownership Tract A-102: The Southern California District Council of the Assemblies of God, Inc., whose ownership includes the underlying fee to the In-Plant Road.

Ownership Tract A-106: Consolidated Vultee Aircraft Corporation or The Southern California District Council of the Assemblies of God, Inc., an undivided 14/20s interest, The Salvation Army, a California corporation, an undivided 3/20s interest and The Salvation Army, a New York corporation, an undivided 3/20s interest.

Ownership Tract A-107: The Southern California Children's Aid Foundation, Inc., a California non-profit corporation.

Ownership Tract A-108: The Salvation Army, a California corporation.

Ownership Tract A-109: Charles W. Carlstrom, also known as C. W. Carlstrom.

Ownership Tract A-110: The Salvation Army, a California corporation, and The Salvation Army, a New York corporation, are the owners of an undivided $\frac{1}{2}$ interest in that portion adjacent to the northeasterly side of Tract A-101, and Charles W. Carlstrom, also known as C. W. Carlstrom, is the owner of the portion adjacent to the northeast side of Tract A-109.

Ownership Tract A-111: The Salvation Army, a California corporation, and The Salvation Army, a New York corporation, are the owners of an undivided $\frac{1}{2}$ interest in that portion adjacent to the northeast side of Tract A-101, and the Southern California District Council of the Assemblies of God, Inc. as to the portion adjacent to the northeast side of Tract A-102.

Ownership Tracts A-112 to A-118: The Southern California District Council of the Assemblies of God, Inc.

Ownership Tracts A-120 and A-121: The Southern California District Council of the Assemblies of God, Inc. is the owner of an undivided $\frac{14}{20}$ s interest, The Salvation Army, a California corporation, is the owner of an undivided $\frac{3}{20}$ s interest, and The Salvation Army, a New York corporation, is the owner of an undivided $\frac{3}{20}$ s interest.

Main Utility and Service Lines, Firehouse and Firehouse Facilities and Transformer Bank Facilities and Equipment: Southern California District Council of the Assemblies of God, Inc. an undivided $\frac{14}{20}$ s interest, The Salvation Army, a California corporation, an undivided $\frac{3}{20}$ s interest and The Salvation Army, a New York corporation, an undivided $\frac{3}{20}$ s interest.

Dated: February 26, 1957.

LAUGHLIN E. WATERS,
United States Attorney,
JOSEPH F. McPHERSON,
GEORGE F. HURLEY,
Assistant U. S. Attorneys,

/s/ By ROGER P. MARQUIS,
Attorney for United States of America, without
prejudice to any future question of ownership.

JAMES DON KELLER,

District Attorney,

DUANE J. CARNES,

Deputy District Attorney,

/s/ By DUANE J. CARNES

Attorneys for The County of San
Diego.

JEAN F. DuPAUL,

City Attorney,

ROBERT T. SJOGREN,

Deputy,

/s/ By ALAN M. FIRESTONE,

Attorneys for City of San Diego.

HILL, FARRER & BURRILL,

/s/ By STANLEY S. BURRILL,

Attorneys for Charles W. Carlstrom.

PROCOPIO, PRICE, CORY &

SCHWARTZ,

PAUL, HASTINGS & JANOFSKY,

/s/ By LEONARD S. JANOFSKY,

Attorneys for Children's Aid.

PAUL, HASTINGS & JANOFSKY,

/s/ By LEONARD S. JANOFSKY,

Attorneys for Assemblies.

RUBIN & SELTZER,

HILL, FARRER & BURRILL,

/s/ By STANLEY S. BURRILL,

Attorneys for The Salvation Army.

[Endorsed]: Filed March 19, 1957. Paul P.
O'Brien, Clerk.



No. 15385

In the
United States Court of Appeals
For the Ninth Circuit

DICK LEE EVANS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

J. B. TIETZ

410 Douglas Bldg.

257 S. Spring St.

Los Angeles 12, Calif.

Attorney for Appellant.

FILED

FEB 25 1957



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In the
United States Court of Appeals
For the Ninth Circuit

DICK LEE EVANS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 15385

Appellant's Opening Brief

JURISDICTION

This is an appeal from a judgment rendered and entered by the United States District Court for the Southern District of California, Central Division. The appellant was sentenced to custody of the Attorney General for a period of three months [R 8].¹ Title 18, Section 3231, United States Code confers jurisdiction in the district court over the prosecution of this case. This Court has jurisdiction of this appeal under Rule 27(a) (1) and (2) of the Federal Rules of Criminal Procedure. The Notice of Appeal was filed in the time and manner required by law [R 9].

¹R refers to the printed Transcript of Record.

STATEMENT OF THE CASE

Appellant was indicted under U.S.C., Title 50, App. Sec. 462 (Universal Military Training and Service Act) for refusing to submit to induction [R 3-4].

Appellant pleaded Not Guilty, waived jury trial and was tried on July 23, 1956 [R 11], by Judge Thurmond Clarke. Appellant was convicted, and sentenced on August 6, 1956 [R 7-8].

At the close of the evidence, a Motion for Judgment of Acquittal was made, argued, and denied [R 6-7].

THE FACTS

Appellant registered with Local Board No. 115 on June 27, 1951 [Ex 1-2].² He filed the standard eight-page Classification Questionnaire on November 26, 1951 [Ex 4-12]. In it he showed he was a student of the ministry under the direction of the Watch Tower Bible and Tract Society, and also that he regularly served as a minister [Ex 6]; additionally he signed the paragraph wherein registrants are asked to declare if they are conscientious objectors to participation in warfare [Ex 10].

Subsequently, the demands of his new secular occupation, (long-distance truck driver) prevented him from regularly following the regimen of the Watch Tower Society, the *sine qua non* for being considered a "witness" of Jehovah by his brethren [Ex 48]. This,

²Ex refers to a photocopy of the Government's exhibit (the selective service file of appellant) admitted in evidence by stipulation. The pagination is at the bottom of each sheet of the exhibit, circled.

he spelled out in a later questionnaire by explaining his answer "no" to the question, "Are you a member of a church, religious organization, or sect?" He stated: "To be a member you have to be active." On the same page [Ex 48] he showed he had become a "member" at eight years of age but, "I haven't been active in the preaching work or attending Bible Studies Regular, but that doesn't change the way I believe."

In the very first questionnaire he had indicated he was also a conscientious objector to participation in war [Ex 10], so the local board sent him the Special Form for Conscientious Objectors. He completed this form [Ex 13-17] and in the manner that distinguishes the Jehovah's witness conscientious objectors from the pacifist registrants, namely, by showing that his commitment to Jehovah precluded participation in *worldly, carnal* warfare, and that he believed in self-defense. [See Ex 18, as well as 16 and 14]. His explanation of his position on this latter subject was equivalent to that of the western states' law pertaining to self-defense [Ex 14 (5)].

His evidence in the Special Form for Conscientious Objectors showed that he believed in a Supreme Being [Ex 13, series II] and that he received his belief on this subject, and on conscientious objection, from his parents, from the age of seven [Ex 14 (3)]; that he relied on "Christ Jesus and Jehovah God for my guidance, and the Watch Tower Bible and Tract Society . . . " [Ex 14 (4)]; that he had discussed his views on conscientious objection publicly on several occasions [Ex

14 (7)]. He showed he had never been a member of any military organization [Ex 16 (series IV)]. He gave the names and addresses of four references, who could supply information as to the sincerity of his conscientious objections [Ex 7 (series V)], and he attached a thirty-one-page booklet entitled "Neutrality" [Ex 18-19],³ in response to a request for the official creed of his religious sect on the subject of their opposition to participation in carnal warfare [Ex 16 (series IV 2e)].

No evidence, rebutting any of the above, nor any reflecting on his veracity or sincerity was before the local board, for none was ever reduced to writing by the local board and placed in the file, as the regulations require [32 C.F.R. 1623.1 (b)].

Nevertheless, the local board classified him, on February 13, 1952, in Class I-A [Ex 11]. No reason for the rejection of his conscientious objector claim was at that time placed in the file, although subsequently (June 14, 1955) this same board, in reconsidering his case, made a memorandum [Ex 54] wherein his views on self-defense, his ownership of a hunting-type rifle, his activity as a hunter, his willingness to haul "construction" material, his unwillingness to aid wounded soldiers and a question asked of him if fear was his mo-

³When the Selective Service System prepares photocopies of a registrant's file, for trial use, it does not photocopy in full (for reasons of economy) multi-page printed publications submitted by the registrant during his administrative processing.

By agreement of counsel, appellant is lodging with the Clerk of this Court four complete copies of the 31-page booklet, "Neutrality", and is designating the document "Supplemental Exhibit."

tive (he gave a negative reply) were the elements, and the only elements of belief and/or conduct mentioned in the rejection memorandum.

Appellant timely perfected an administrative appeal from this I-A classification. Thereafter, for the first time, material adverse to his claim for a conscientious objection classification, came into the file: the FBI reports and the documents based on them [Ex 29-]. Although appellant's good character and veracity were never attacked, his sincerity was, by some. The irrelevant nature of the evidence supporting those attacks will be commented on during the argument, hereinbelow. His claim for a conscientious objector classification was rejected by the Appeal Board, on August 5, 1954 [Ex 23].

The local board thereafter, on its own initiative, gave him a new questionnaire. He promptly completed and filed it [Ex 48-51]; the board as promptly decided, "Reviewed but not reopened," on September 14, 1954 [Ex 11]. There was, in fact, nothing new concerning his status that he did or could submit.

Thereafter, the local board once more apparently reviewed his file, for it made the following entries: "May 10, 1955, Re-opening of case authorized by Operations Bulletin No. 123;" and "May 10, 1955, I-A KCW 3-0" [Ex 11]. On the same day (see Ex 11) the local board mailed appellant a standard Notice of Classification. It informs the recipient (see Ex 35) that he has ten days after a local board classification action to ask for an Appearance before Local Board and/or to appeal.

Appellant did neither. On June 1, 1955, the local board once again took the initiative and wrote appellant to come in for an interview. He appeared on the date specified by the board; the board's summary of the interview [Ex 54] indicates the narrow and, as argued hereinbelow, illegal nature of the inquiry.

On the same day, namely, June 14, 1955, the local board mailed him another notice card that he was reclassified in Class "I-A". Again he neither asked the Local Board for a formal Appearance before it, nor that the Appeal Board review his file. Then, on November 23, 1955, the Local Board sent him an Order to Report for Induction [Ex 11]. Appellant obeyed the order to the extent of appearing at the induction station, but there refused to submit to induction; his indictment and conviction followed.

During the trial, testimony concerning appellant's no-basis-in-fact and denial-of-due-process defenses, was admitted, subject to a ruling on the objection of the plaintiff, namely, that appellant was precluded from entering such "classification" defenses because he had not taken an administrative appeal from the I-A classification of May 10, 1955, and/or June 14, 1955. The testimony of the defendant was unrebutted.

QUESTIONS PRESENTED AND HOW RAISED

I.

The threshold question of availability of defenses is present.

The undisputed evidence is that this appellant was never classified in any class other than Class I-A, and that when he was first so classified, he perfected an administrative appeal and was kept in said class by the Appeal Board; that thereafter no relevant and material new, further, or additional evidence adverse to either of his conscientious objection claims, or favorable to a claim for any other classification was presented but that the local board subsequently again and yet again placed him in said Class I-A (and in no other); in sum, that he took only one administrative appeal.

The question presented may be stated as follows: "Is a defendant, in a felony selective service prosecution, precluded from presenting classification and/or due process defenses where the record shows he perfected an administrative appeal from only the first of three I-A classifications, absent intervening, relevant and material evidence?" Stated more argumentatively: May a local board, by repetitively reclassifying a registrant in the same class, without intervening new evidence, require repetitive, and obviously vain, appeals?

This question was squarely raised by both counsel [R 12, 15].

II.

Concerning the no-basis-in-fact defense:

It is appellant's position that there was no basis in fact for classifying him in Class I-A in the face of the undisputed evidence supporting his claim for a I-O and/or I-A-O classification.

This question was raised by Motion for Judgment of Acquittal [R 6-7].

III.

Concerning denial of due process:

It is appellant's position that the evidence shows that false, artificial and illegal standards were used by the Selective Service System (and by the Department of Justice recommending officials) in denying appellant at least a I-A-O classification, to his prejudice.

This question was raised by the Motion for Judgment of Acquittal [R 7].

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal.

II.

The district court erred in convicting the appellant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

POINT I.

APPELLANT WAS NOT REQUIRED TO REPETITIVELY APPEAL THE I-A CLASSIFICATIONS, THERE BEING NO RELEVANT NEW EVIDENCE, AND THEREFORE HE IS ENTITLED TO HAVE HIS DEFENSES CONSIDERED.

That Evans did not repetitiously appeal does not make the rule of exhaustion of administrative remedies applicable. The Supreme Court and other cases are reviewed in the argument to show that the rule is not ironclad and that it has many types of exceptions.

The facts of his case bring Evans within several of the recognized exceptions. No relevant and material new evidence appears in the file between the time Evans first perfected an appeal and the time he was repetitiously reclassified in the same class, I-A. All of this Court's decisions and the Supreme Court's on this subject of exhaustion are distinguishable: all are either where the registrant never once appealed anything, or where there were intervening, different classifications, with intervening additional factual matters.

Evans was not required to do a vain thing. Reason and the cases cited in the argument support this view.

Moreover, the nature of his defenses bring him within the recognized exceptions to the rule. Finally, the rules of the Selective Service System itself favor the position that no appeal was required because its rule states that the registrant had no right of appeal after

his reclassification. See Local Board memorandum 52, Par. 3(a). Therefore, his following two defenses should be considered on their merits.

POINT II.

DENIAL OF THE CONSCIENTIOUS OBJECTOR STATUS WAS WITHOUT BASIS IN FACT

Appellant showed the local board that he opposed participation in noncombatant and combatant military service. His professions were that he believed in a Supreme Being, that he received his religious training from his parents from the age of seven, that he relied on Christ Jesus and Jehovah God and the Watch Tower Bible Society for his guidance. His training and belief were all religious and in no way based on the proscribed bases, or any of them. He gave names and addresses of references and gave other supporting information.

When the local board initially classified him in Class I-A there was nothing in the file to contradict his *prima facie* case in any manner or degree whatsoever.

After he perfected an administrative appeal, the resume in the file of the FBI informants' statements, presented divided opinions, as follows: Although none attacked his veracity, and his character received commendation (even from those who expressed opinions against him) some of these faceless people doubted the

sincerity of his objections to war. Since the factual bases for their doubts are given, they can and should be examined for relevancy and materially. In no instance was any of the "facts" relevant to the stated conclusion that is, relevant by the current standards of this Court and of the Supreme Court. These cases are cited in the argument. Therefore, there was no basis in fact for the I-A classification.

POINT III.

THE LAW DOES NOT PERMIT CLASSIFICATIONS BASED ON THE STANDARDS USED FOR THIS APPELLANT.

The record reveals that the classifying and recommendatory agencies involved, used the following tests or standards in the classification process, and no other:

- 1) Willingness to haul "construction" material.
- 2) Unwillingness to aid wounded soldiers.
- 3) Views on force and self-defense.
- 4) Hunting wild game.
- 5) Registrant admitted he was slack in religious duties.
- 6) Unwillingness to accept either combatant or non-combatant duties.
- 7) Unwillingness to perform I-O type work.
- 8) Smoking and drinking.

A question was asked at the local board hearing about "fear" but there was no evidence whatever on this subject nor any finding.

It is settled in this jurisdiction that some of these tests (specified herinafter, in the argument) are not legal bases for denying a conscientious objector classification; it is contended *all* these tests *as applied*, should be outlawed.

In any event the classifying process is a chain; when an illegal standard enters into the classifying process, either by way of a Department of Justice recommendation (see Ex 29-31), or by way of a board-made summary of its classifying deliberations (see Ex 54), the entire chain is broken unless *possibly*, it is clear that no reliance was placed on the illegal standard by the classifying agency. The record here indicates that these illegal tests, *and no others*, were relied on, to appellant's prejudice.

The *only* limitation Congress placed in the Act on the definition of conscientious objector, was that the beliefs and training be religious and that they not be essentially political, sociological, philosophical, or be a merely personal moral code. Neither the Selective Service System nor the Department of Justice may add limitations.

Since illegal tests and limitations were used the conviction should be reversed.

ARGUMENT**POINT I.**

APPELLANT WAS NOT REQUIRED TO REPETITIVELY APPEAL THE I-A CLASSIFICATIONS, THERE BEING NO RELEVANT NEW EVIDENCE, AND THEREFORE HE IS ENTITLED TO HAVE HIS DEFENSES CONSIDERED.

Appellant does not intend to argue the entire question of necessity of exhaustion of administrative remedies. He need not assume such a burden. Although the decisions are divided,⁴ this Court has made its position clear on the general proposition. Involved here, however, is an exceptional situation, and one where this Court's rulings do not necessarily require a rejection of this appellant's argument. Appellant exhausted his remedy for relief from classification in Class I-A once; he argues that he need not do so repetitiously, absent new probative facts.

A. Exhaustion Doctrine Not Inflexible.

The chief purpose of the doctrine of exhaustion of administrative remedy is to relieve the courts of a burden better borne by specialists in the various administrative agencies.

The doctrine was not formulated to deprive young men, unassisted by counsel, of their day in court; cf. *Cox vs. Wedemeyer*, 192 F. 2d 920, where this Court

⁴"The Courts of Appeal and district courts have been divided as to whether exhaustion of all administrative remedies must be shown in these selective service cases [citing cases]" *United States vs. Palmer*, 3d Cir., 223 F. 2d 893, 901.

pointed out that, “ . . . the procedure established . . . was designed to fit the needs of registrants unskilled in legal procedure . . . and none of them represented by counsel.” [922-923].

The doctrine of exhaustion of administrative remedies should not be considered inflexible. Many special circumstances should excuse the registrant. This general proposition was very recently restated in *United States vs. Harvey*, 131 F. Supp. 493:

“ . . . the rule that administrative relief must be exhausted before resorting to the courts did not originate in the constitution, or any statute, but came into being simply as a point of judicial policy adopted by the courts, and the courts do not recognize that it must always be applied in hidebound fashion. The rule will be passed by, if there is good reason for making an exception, and that has been done by both the federal and state courts.” [496].

So, in *U. S. ex rel. Filomio vs. Powell*, 38 F. Supp. 183, on page 187, the Court observed:

“Evidence is conflicting as to whether Filomio demanded the questionnaire in order that he might perfect his appeal. We do not feel that it was readily available, and hence his omission in this respect was beyond his control.”

In *United States ex rel. Beye vs. Downer*, 143 F. 2d 125, the Court concluded that it was the local board's fault that Beye had been deprived of an appeal. In *United States vs. Giessel*, 129 F. Supp. 223, a similar conclusion was reached.

Even where the selective service agency is without fault, [appellant does not, however, concede that it was right for the local board to reaffirm his classification repetitiously, by a *formal reclassification*, and thus face him with the problem he has encountered] in a case like *Evans*’ *when an appeal is useless*, the registrant should be permitted to present his facts in court. This is the holding in an old draft case, *Ex parte Cohen*, 254 Fed. 711:

“He ought not to be denied his rights to habeas corpus, where his personal liberty and nationality are involved because of his failure to do a vain thing.” [p. 713).

Certainly where jurisdictional grounds are urged, the registrant should be permitted to present his case in court. The three-judge-minority opinion in *United States vs. Palmer*, *supra*, emphasized a point included in one that appellant *Evans* is pressing: A classification without basis in fact is beyond the jurisdiction of the local board and a defense based on such lack of jurisdiction is permitted by *Estep vs. United States*, 327 U.S. 114. The Second Circuit, also, has expressed grave doubts that a registrant could be denied the opportunity to present his facts in court, “. . . where, on undisputed facts, the Board’s lack of jurisdiction is manifest.” *Schwartz vs. Strauss*, 206 F. 2d 767.

It was early established that the selective service administrative process is a continuous one, beginning with registration and ending at the induction ceremony. *Falbo vs. United States*, 320 U.S. 549; *Estep*, *supra*.

The administrative process is like a ladder; the registrant must go to the very end, but is there a requirement that he step on every rung? No. For example, who would contend a selective service defendant is not entitled to present his defenses if he did everything except ask for a Personal Appearance Hearing? Yet the Personal Appearance Hearing is a most important rung in the ladder, for it is the only opportunity the board ever has to look the registrant in the eye and hear his views for deferment. Similarly, must he step on some rungs twice, or more? Appellant believes once is all that is required and that there is less reason to ask him to step on some rungs repetitiously than there is to ask him to not miss any rungs.

The Supreme Court Selective Service cases lay down no inflexible rule of exhaustion and a mandatory rule is contrary to the general rule of exhaustion of administrative remedies requirement which has been formulated by the Supreme Court as a flexible rule.

In *Falbo*, supra, "petitioner urged that the District Court had erred in refusing to permit a trial *de novo* on the merits of his claimed exemption." The board had classified a Jehovah's witness as a conscientious objector rather than a minister. Since, at that time, the order to report to a Civilian Public Service camp was not the final step in classification (he was later physically examined and might be rejected and placed in Class IV-F), the Court viewed the order to report as "an intermediate step" and not reviewable (as intermediate orders are usually not reviewable). The

Court did not even refer to "exhaustion". It framed the issue and its ruling thus:

"The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process.

"We think it has not." (320 U.S. at 554).

In *Billings vs. Truesdell*, 321 U.S. 542 (1945), the issue again was *not* the rule of exhaustion of remedies. A registrant was denied a classification as a conscientious objector. He reported to the army when directed to, but refused to submit to induction. The army claimed Billings was subject to military jurisdiction. The Court held he was not. In explaining that Billings had tried to complete the selective service process as outlined in the *Falbo* case, the Court for the first time referred to "exhaustion". The Court definitely did not extensively consider the rule; it did not lay down a mandatory rule; it merely said:

"Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. But we can hardly say that he must report to the military in order to exhaust his administrative remedies and then say that if he does so report he may be forcibly inducted against his will. That would

indeed make a trap of the *Falbo* case . . . ” (321 U.S. at 558).

Again in the *Estep* case, (1946), the Supreme Court *did not decide* that a person must exhaust administrative remedies. The real issue was whether Selective Service classifications could be reviewed in criminal prosecution.

On the other hand, if the Selective Service cases be deemed to lay down a mandatory rule requiring exhaustion of administrative remedies, in all instances, then they are an anachronism in the law—for in all other fields the courts have stated the exhaustion rule as a flexible requirement:

“It is true that the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention.” *Aircraft & Diesel Equipment Corp. vs. Hirsch*, 331 U.S. 752, 773, 91 L.Ed. 1796, (1947).

“ . . . Whether it (the Court) should have denied relief until all possible administrative remedies had been exhausted was a matter which called for the exercise of its judicial discretion.” *U. S. vs. Abilene & So. Ry. Co.*, 265 U.S. 274, 282, 68 L.Ed. 1016, (1924).

“ . . . In construing the Act, however, we must be mindful of the ‘long-established rule of judicial

administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' *Myers vs. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 5-51. *But this rule does not automatically require that judicial review must always be denied where rehearing is authorized but not sought. This is shown by our past decisions (citing cases) from which we see no reason to depart."* *Levers vs. Anderson*, 326 U.S. 219, 222, 90 L.Ed. 26 (1945).

"A determinaton of administrative authority may of course be made at the behest of one so immediately and truly injured by a regulation claimed to be invalid, that his need is sufficiently compelling to justify judicial intervention even before completion of the administrative process." *Eccles vs. Peoples Bank*, 333 U.S. 426, 434, 92 L.Ed. 784 (1948).

Professor Kenneth Culp Davis, the recognized authority, in his book, *Administrative Law* (West Publishing Co., 1951), says this of the exhaustion rule:

"The courts usually follow what the Supreme Court calls, 'the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' But even though the Supreme Court customarily states the rule without qualification, the courts in many cases relax the rule. To determine when the rule will be or should be applied or relaxed requires analysis not merely of holdings but also of reasons behind the holdings. . . .

“The principal reasons for requiring exhaustion of administrative remedies relate to efficient management and orderly procedure, use of the agency’s specialized understanding, adequacy of legal remedies, exclusive jurisdiction, and statutory requirements of final order” (Davis, p. 615).

(None of these reasons for requiring exhaustion exist in the present case. Under the new procedure as to physical examination, in effect at the time of Evans’ processing [and currently in effect] the registrant is physically examined long before the Order to Report for Induction is issued; the order to report for induction, therefore, is “final”.⁵ For the appellant whose religious beliefs did not permit him to enter the armed services the procedure was not “adequate”. The agency had already exercise whatever special skill it had. The board’s total disregard of evidence hardly recommended it for orderliness or efficiency. And the Supreme Court in the *Estep* and in many other draft cases had shown that for ultimate review the Selective Service Act did not exclude the courts.)

Davis goes on to state the situations in which the exhaustion requirement shall not apply. The instant case falls within these exceptions:

“When pursuing administrative remedies will cause irreparable injury, when administrative remedies are inadequate, or when the agency’s action is unconstitutional or beyond its jurisdiction or

⁵At the time of the *Falbo* decision the only physical examination was at the induction station, where the selectee was ordered to report for induction. Thus, a large percentage of selectees were rejected then and there.

clearly illegal, the courts sometimes relax the requirement that administrative remedies must be exhausted before the courts will intervene." (Davis, p. 621).

Davis collects, from pp. 621 to 633 the many cases not requiring exhaustion, only a few of which can be referred to here.

B. The Cases Requiring Exhaustion are Distinguishable.

1) The Supreme Court cases requiring exhaustion: None are applicable to appellant's case.

Prof. Harrop A. Freeman, in his Brief for Appellant in *Palmer*, supra, examines the Supreme Court cases on the subject and concludes that those demanding exhaustion of administrative remedies fall within the following observations:

a) The exhaustion principle originated in equity cases refusing injunctions because the legal remedy of completing the administrative proceedings and then petitioning for judicial review was adequate. A large proportion of cases presenting the exhaustion issue are equitable cases.

See authorities in 44 Mich. L. Rev. 1035 (1946), and 303 U. S. 41, 51 note 9.

b) In some cases requiring exhaustion the legislature had given the administrative agency "exclusive jurisdiction"; there was an attempt to enjoin agency action *before any agency action had occurred* and thus to completely nullify the statute. There was no "order" to be reviewed.

Myers vs. Bethlehem Shipbuilding Corp.,
supra;

Macauley vs. Waterman S.S. Corp., 327 U.S.
540, 90 L.Ed. 839 (1946).

c) In some the agency action was preliminary and not final.

F. P. C. vs. Metropolitan Edison Co., 304
U.S. 375, 82 L.Ed. 1408 (1938).

d) In some there was only a "supposed or threatened injury".

Myers vs. Bethlehem S. Corp., supra.

(e) Many involved tax collections where payment and later recovery of the tax was thought wiser than to challenge the whole tax power (a special application of the equitable principle of adequacy of the legal remedy).

State R. R. Tax cases, 92 U.S. 575, 23 L.Ed.
663 (1875);

Poindexter vs. Greenhow, 114 U.S. 270, 29
L. Ed. 185 (1884);

Milwaukee vs. Koeffler, 116 U.S. 219, 29
L. Ed. 612 (1885);

Dalton Co. vs. State Corp. Comm., 236 U.S.
699, 59 L.Ed. 797 (1914).

All these cases were cited in the *Myers* case, yet even this group of cases recognizes as excuses for exhaustion: (1) lack of due process—*Londoner vs. Denver*, 210 U.S. 373, 52 L.Ed. 1103 (1907); (2) irreparable injury—*Poindexter vs. Greenhow*, supra; (3) inadequacy of remedy—*Dawson vs. Freiburg Co.*, 255 U.S. 288, 65 L.Ed. 638 (1920).

2) The Supreme Court cases not requiring exhaustion of administrative remedies are many and seem to fall into the following categories:

1) *Irreparable injury.*

Public Utility Comm. vs. United Fuel Gas Co.,
317 U.S. 456, 87 L.Ed. 396 (1943) ;

Utah Fuel Co. vs. Bituminous Coal Comm., 306
U.S. 56, 83 L.Ed. 483 (1939).

2) The orders involved are “*on their face plainly invalid*” or “*in disregard of law*”.

P. U. C. vs. United Fuel Gas Co., *supra*.

Recognized in: *Delaware & Hudson Co. vs. U. S.*, 266 U.S. 438, 69 L.Ed. 369 (1924).

3) *Unconstitutionality.*

Hillsborough vs. Cromwell, 326 U.S. 620, 90
L.Ed. 358 (1946).

4) *Agency had acted beyond its jurisdiction.*

Gonzales vs. Williams, 192 U.S. 1, 48 L.Ed.
317 (1904) ;

Skinner & Eddy Corp. vs. U. S., 249 U.S. 557,
63 L.Ed. 772 (1919) ;

P. U. C. vs. United Fuel Gas Co., *supra* ;

Ill. Comm. vs. Thompson, 318 U.S. 675, 87
L.Ed. 1075 (1943).

5) *Improbability of obtaining adequate relief in the administrative process.*

Smith vs. Illinois Bell Co., 270 U.S. 587, 591,
70 L.Ed. 747 (1926);
Order Ry. Cond. vs. Swan, 329 U.S. 520, 91
L.Ed. 471 (1947);
Union Pac. Ry. vs. Board, 247 U.S. 282, 62
L.Ed. 1110 (1918);
Waite vs. Macy, 246 U.S. 606, 62 L.Ed. 892
(1918);
Montana Nat. Bk. vs. Yellowstone Co., 276 U.S.
499, 72 L.Ed. 673 (1928);
Hillsborough Tp. vs. Cromwell, 326 U.S. 620,
90 L.Ed. 358 (1946);
City Trust Co. v. Schrader, 291 U.S. 24, 78
L.Ed. 628 (1924).

6) Agency had entered final order and *only administrative reconsideration or appeal remains* (discretionary for court to take jurisdiction).

Prendergast vs. N. Y. Tel. Co., 262 U.S. 43, 48,
67 L.Ed. 853 (1923);
U. S. vs. Abilene & S. R. Co., *supra*;
Levers vs. Anderson, *supra*;
Fed. Adm. Pro. Act, sec. 10 (c).

7) Agency or government brings the court proceeding civilly or criminally and the *defendant merely defends against an invalid order*.

F. P. C. vs. Panhandle E. Pipe Line Co., 337
U.S. 498, 93 L.Ed. 1499 (1949).

Appellant will discuss the application of the cases not requiring exhaustion of administrative remedy in

the two portions of his argument headed Point II and Point III, below, wherein he presents his two defenses, one attacking the jurisdiction of the board, and the other presenting a denial of due process. However, before proceeding to his two arguments on the merits, he desires to offer some further cases and comment by way of concluding his argument on exhaustion. The attention of the Court is particularly invited to comment (4) below [Improbability of obtaining Administrative Relief Excuses Exhaustion] in the following argument:

C. Evans' Case Presents Five Exceptions to the Rule.

1) Lack of change of status is the governing fact in this case.

It has been long, firmly and nationally established that if a registrant furnishes no *new* information, it is not required of the board that it reclassify him again, although he repetitiously, directly, or impliedly, requests such reclassification action. The leading case is *United States vs. Zieber*, 3rd Cir., 161 F. 2d 90, wherein the Court said:

“If Zieber furnished no new information this Board was not required to classify him again.”
[92].

By like reasoning, appellant submits, a registrant should not be required to take repetitious and vain appeals. This reasoning, appellant believes, is merely the other side of the *Zieber* coin.

This Court has already used language with the converse of this line of reasoning. Preliminarily, we find in *Kaline vs. United States*, 235 F. 2d 54:

“It is settled that a registrant is not entitled to a judicial review of any classification from which he did not appeal [citing cases].” [62].

Appellant Evans submits that his facts bring him within the corollary of this holding: No one contends that Evans ever was in any other classification than I-A (and from which he had appealed); nor can anyone contend that his subsequent “reclassifications” in Class I-A were the result of any new evidence. Shortly after *Kaline*, supra, this Court, in [Arthur] *Clark vs. United States*, 236 F. 2d 13, approached very near to the conclusion that appellant Evans is urging. *Clark* holds:

“A registrant is not entitled to repetitious determinations of identical issues. [Citing *Davidson vs. United States*, 9th Cir., 218 F. 2d 609].” [21].

Since repetitious appeals are not permitted, surely repetitious appeals should not be required on identical issues.

Davidson had asked for a second appeal; the local board, either through mistake, or out of an abundance of good will, again started his file on the route of the special appellate procedure provided for registrants professing conscientious objections. This Court, on pages 611-612, said:

“The record submitted to the appeal board contained *nothing new* which could affect its prior decision. An alert hearing officer first saw the mistake and advised Davidson that he was not entitled to a second hearing because he had already had one. The Department of Justice notified the appeal board that *there was no new evidence* which altered its previous recommendation that the registrant’s conscientious objector claim be not sustained. We are of the view that this conclusion was correct and it was not incumbent upon the Department to grant Davidson a hearing on this second occasion of his appearing before the hearing officer.” . . .

“To require appeal boards and the Department of Justice to consider and reconsider cases of this nature at the whim of the registrants would unnecessarily tend to confuse the appellate procedures and would be violative of the system set forth with preciseness in section 6(j).” [Emphasis supplied.]

Appellant submits it would tend to confuse the appellate procedure, unnecessarily burden the appellate machinery, and be unfair to registrants (none of whom are legally trained to appeal every ‘final order’) to require them to repetitiously perfect an appeal whenever repetitiously given the very same classification, no new evidence or different classification intervening.

Appellant Evans’ case is readily distinguishable from any of this Court’s decisions on the subject of exhaustion of administrative remedies and also from the only *en banc* decision on the subject, *Palmer vs.*

United States, supra. There, by a four to three decision, the registrant's conviction was affirmed, but the majority took pains to point out that Palmer had ignored the *entire* remedial process [897]. Palmer was a "non-registrant" and had never appealed *anything*. Appellant Evans undisputedly pursued his remedial process from classification in Class I-A, the only class he was ever in.

This Court's several "exhaustion" cases are distinguishable in that either no appeal at all was ever taken, or a new status entered the file, one requiring an appeal.

2) Lack of jurisdiction excuses failure to exhaust remedies.

In *Gonzales vs. United States*, 192 U.S. 1, habeas corpus was brought by a Puerto Rican woman who was held in custody after the Immigration Commissioner had determined she was an "alien immigrant" subject to exclusion. Appeals to the Superintendent of Immigration and to the Secretary of Treasury were authorized by statute. Said the Court, p. 15:

" . . . the commissioner had no jurisdiction to detain and deport her (for she was not an alien immigrant) . . . and *she was not obliged to resort to the Superintendent or the Secretary.*"

The very nature of this defense makes inapplicable the supposed *Falbo* rule of exhaustion.

In *Varney vs. Warehime*, 147 F. 2d 238, 243, cert. den. 325 U.S. 882 (1945), the Court said that the ex-

haustion requirement "is not an iron-clad rule and it has no application where the defect urged goes to the jurisdiction of the agency."

This is recognized in the immigration cases cited by the Supreme Court in the *Estep* case, *supra*, and seems to be accepted in that case when the Court speaks of a Pennsylvania Board ordering a citizen of Oregon to report for induction and "the defense that it had acted beyond its jurisdiction could be interposed in a prosecution under Sec. 11."

3) Lack of due process and clear error of law excuse failure to exhaust remedies.

Elsewhere we refer to the lack of due process and errors of law as independent defenses—and the Supreme Court has recognized this as a Selective Service defense in the *Estep* case—but the same lack of due process and the same clear errors of law also excuse non-exhaustion of administrative remedies (as pointed out in the authorities cited above).

Lack of due process is referred to as excusing the exhaustion of remedies by Judge Frank in the Selective Service case of *Schwartz vs. Strauss*, *supra*.

It is the basis of cases like *Skinner Corp. vs. United States*, *supra*, and the *United Fuel Gas* case, *supra*, which relieved a party of the necessity of exhausting administrative remedies.

It seems to be recognized in the *Estep* case is discussing an attempt to induct a congressman or to

classify a person as available for induction because he is a Negro, Jew or German, of which the Court says:

“In all such cases its action would be lawless and beyond its jurisdiction.”

It is the holding in *United States vs. Donovan*, 178 F. 2d 876 (C.A. 7th, 1949), a parole case excusing exhaustion where lack of due process is shown.

It was on the theory of an allegation of lack of due process in military segregation that a Negro was allowed by the Eastern District of Pennsylvania to challenge a I-A classification without exhausting his administrative remedies in *United States vs. Tomlinson*, 94 F. Supp. 854 (1953).

It was the basis of the decision of the same court in hearing a veteran's preference case even without exhaustion of administrative remedies:

“Where a statute, which commands an official of the government to perform, or prohibits him from performing an act in a particular situation is so clear as to be free from doubt as to what it prescribes, a court will enjoin a violation of the Act *even though the victim has not pursued his administrative remedies.*” *Brainer vs. Wallin*, 79 F. Supp. 506, 508 (1951).

In *Wettre vs. Hague*, 74 F. Supp. 396, a district court refused an injunction in a veteran's preference case because there had been no exhaustion of administrative remedies. Then the Supreme Court in *Sullivan vs. Hilton*, 334 U.S. 323, decided the substantive rule

contrary to that applied by the Civil Service Commission; so the Court of Appeals in *Wettre vs. Hague*, 168 F. 2d 825 (C.A. 1st, 1948), held that since the administrative action was a clear error of law, "there is no longer any occasion for the requirement that they exhaust whatever administrative remedies they may have."

In *ex parte Fabiani*, 105 F. Supp. 139 (1952), E.D. Penna., a medical student in Italy was allowed to defend against a I-A classification though he had not exhausted his administrative remedies. (He not only had not appealed, but he had not reported for physical examination or for induction.) The Court cited case after case where lack of due process and clear error of law were defenses to prosecution for selective service violations and concluded that exhaustion was excused under these cases.

In addition to the numerous cases cited in the *Fabiani* case, in which lack of due process and clear errors of law resulted in declaring classifications invalid and preventing convictions for their violation, many could be added because there are 125 reported selective service cases since Korea, wherein one or more reasons have been given for a judgment of acquittal, or for reversal of a judgment of conviction.

4) Improbability of obtaining administrative relief excuses exhaustion.

This is one of the grounds for excusing exhaustion which all the authorities recognize. It was the ground for refusing to require exhaustion of remedies in *Smith vs. Illinois Bell Co.*, 270 U.S. 587, 70 L.Ed. 747 (1926), where the administrative agency had shown by past conduct it would not act. So also, in *Order of Railway Conductors vs. Swan*, 329 U.S. 520, 91 L.Ed. 471 (1947), the Supreme Court intervened in advance of administrative action (expressly distinguishing the *Myers* case, *supra*, requiring exhaustion) to relieve a stalemate within the board by which the first and fourth divisions disagreed as to who had jurisdiction, saying:

“We are dealing with a jurisdictional frustration on an administrative level, making impossible the issuance of administrative orders which Congress explicitly has opened to review by the courts.”

In *City Bank Farmers' Trust Co. vs. Schnader*, 291 U.S. 24, 78 L.Ed. 628 (1934), the Supreme Court did not require exhaustion where it was certain from previous action that the administrative officers would give an adverse decision. Many other Supreme Court cases are referred to above, and collected in Davis, *Administrative Law*, pp. 625-628.

In *ex parte Cohen*, *supra*, the inductee was excused, the Court concluding that the administrative appeal would have been “a vain thing.” [p. 713].

The Courts constantly recognize this exception to the exhaustion rule and apply it as in the recent case of *Fidalgo Island Packing Co. vs. Phillipa*, 120 F. Supp. 777 (D.C. Alaska, 1954), where the defendant was excused from exhausting his administrative remedies where the Commission was deadlocked in a tie vote on all major issues; to have appealed to the commission would have gained no result.

In the instant case, the board had already formally disregarded all the undisputed evidence in Evans' file; the appeal board had already formally rejected his claim; *he had no new evidence to present*. It would have been useless to have again asked the Selective Service System to go through the same procedure on the same facts.

Finally [on this sub-point]: Evans had obviously learned from his contacts with them that the classifying agencies were using irrelevant standards to deny him a classification called for by his evidence; as will be shown hereinafter, most of these standards are already outlawed by appellate decision and the balance are, to say the least, suspect. Therefore, to apply an apt expression used by the First Circuit in *Steele vs. United States*, F. 2d, decided December 21, 1956, slip opinion page 7 Evans had reason to regard the boards as "less than expert and possibly hostile."

5) Appeal not possible.

The Director of Selective Service promulgates a number of departmental regulations and directions. These are variously termed: Operations Bulletins, Local Board Memoranda, etc. It is doubtful if they have the full force of law, none being published in the Federal Register and, with the exception of the LBMs, wholly unavailable to registrants; nevertheless, the following is submitted for the Court's consideration.

It is to be observed that when the board called in its registrant for an interview on June 14, 1955, it stated it was acting "In conformity with Selective Service Local Board Memorandum No. 52, Paragraph 3(a) . . . " [Ex 46].

Local Board Memorandum No. 52 reads:

"3. WHEN PERSONAL APPEARANCE IS NOT A PROCEDURAL RIGHT.—(a) A registrant is not entitled to a personal appearance as a procedural right unless he makes a request therefor after he has been classified by the local board and within 10 days after the Notice of Classification (SSS Form No. 110) has been mailed to him. However, the local board may in its discretion permit a registrant to appear in person pursuant to his request made at any other time or the local board may, upon its own initiative, direct a registrant to appear before it. In both such instances the appearance of the registrant before the local board does not constitute a personal appearance under section 1624.1 of the regulations, *and no right of appeal to the appeal board*

accrues to the registrant solely because of any such appearance.”

[Issued: January 14, 1953 and unchanged to date of this Opening Brief. Emphasis supplied.]

In summary: It is apparent that the rule requiring exhaustion of administrative remedies is not inflexible. Appellant believes the facts entitle his predicament to be considered an exception to the exhaustion rule, and that his defenses (argued hereinafter) should be considered, and that they are sufficiently meritorious to have required a judgment of acquittal.

POINT II.

THE DENIAL OF THE CONSCIENTIOUS OBJECTOR STATUS WAS WITHOUT BASIS IN FACT

Section 6(j) of the act (50 U.S.C. App. § 456(j), 65 Stat. 75, 83, 86) provides:

“Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief, in this connection, means an individual’s belief in a relation to a Supreme Being, involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.”

Section 1622.14 of the Selective Service Regulations (32 C.F.R. § 1622.14) provides:

“Class I-O: *Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.*

—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.”

Section 1622.11 provides:

“Class I-A-O: *Conscientious Objector Available for Noncombatant Military Service Only.*—

(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.”

The attitude of the Selective Service System and of the court below, concerning whether there was a basis in fact for the classification was grounded upon error. To begin with, it ignores the doctrine of *Dickinson vs. United States*, 346 U.S. 389 (1953). That decision requires that the board, “. . . must find and record affirmative evidence that he has misrepresented his case . . . ” —346 U.S., pp. 396-397, 399 (dissenting opinion). And it also ignores the doctrine of *Witmer*

vs. United States, 75 S.Ct. 392 (1955) wherein the yardstick of sincerity is made the law. Absent any finding recorded that questions it, the *Dickinson* doctrine controls.

Congress says that a man is a conscientious objector if he (1) believes in a Supreme Being, (2) conscientiously opposes participation in the armed forces by combatant or noncombatant service, and (3) bases such objection on religious training and belief. The appellant concededly believed in a Supreme Being. He opposed participation in the armed forces. He based those objections on his religious training and belief.

The evidence submitted by the appellant established at least *prima facie*⁶ that he had sincere and deep-seated conscientious objections against participation in combatant and also noncombatant military service and that these objections were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not in the least based on "political, sociological, or philosophical views, or a merely personal moral code"; that it was entirely based upon his religious training and belief as one of Jehovah's witnesses. The subsequent fact that his secular work became such that he could not devote the usual time required of a "witness" (and to continue to be

⁶The language of *Dickinson* is:

"But when the uncontroverted evidence supporting a registrant's claim places him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice.

"Reversed." [74 S. Ct. 152, 158].

considered a minister by his brethren) does not detract from the beliefs he held. After his secular work changed he was presented with a new questionnaire by the local board. In answering it he specifically pointed out that his current inactivity in witness missionary work had no relation whatever to his conscientious objections to participation in war. The questionnaire asked concerning church membership. He explained his answer of "no" by stating: "To be a member you have to be active," and "I haven't been active in the preaching work or attending Bible Studies Regular, *but that doesn't change the way I believe.*" (emphasis supplied).

The Selective Service System raised no question [none is recorded] concerning the *veracity* of the petitioner. The question therefore is not one of fact, but is one of law; *Dickinson vs. United States*, supra. The law and the facts in his file, at least *prima facie*, establish that petitioner is a conscientious objector opposed to combatant and noncombatant service.

It is to be noted that even the hearsay evidence of the FBI investigative report did not question his veracity. There are two documents on this portion of the evidence: The Department of Justice recommendation to the Appeal Board, and the resume of the FBI investigative report. The former [Ex 29-31] mentioned only irrelevant facts⁷: appellant's inactivity in witness work; that he occasionally had smoked and drank; that he believed in self-defense; the Hearing Officer's conclusions (with no *relevant* evidence or reasons given to

⁷The "irrelevancies" are argued in more detail in Point III, below.

support them) that appellant was not religious and that his claim was not made in good faith. The conclusions of several informants (but not all, by any means) that he was not sincere in his conscientious objections, were in all instances based on irrelevant standards; none was based on a question of his veracity. Conclusions must be supported by relevant evidence; *Blevins vs. United States*, 9th Cir. 217 F. 2d 506, 508. Also, as was said in *United States vs. Close*, 7th Cir. 215 F. 2d 439: "But the reasons for the opinions expressed in the interviews were not shown." [441]

The resume contained many statements that he was of good character and reputation, trustworthy and dependable [Ex 31]. The "adverse" evidence was that he was not considered "particularly religious," that he was heard to use profane language when he became angry [Ex 31]; that he had a "hopped-up hot rod," and "that the registrant never displayed any interest in **church** work or church activities, and he does not understand how the registrant can file his conscientious objector claim in view of this and he, therefore, does not believe the registrant should be a conscientious objector." [Ex 32].

Nevertheless, neither this above-quoted informant, nor any of the others who gave the FBI "adverse" facts, questioned Evans' veracity.

On the other hand, if it be considered that the above two documents contained relevant, adverse facts, then the doctrine of *Gonzales vs. United States*, 75 S.Ct. 409, comes into play and it alone requires reversal. As was

said in *United States vs. Cooper*, 3d Cir., 223 F.2d 448: "What Gonzales was entitled to, Cooper was entitled to." [448]. Until the *Gonzales* decision, as stated therein, nothing in the law (neither the Act, nor the Selective Service Regulations, nor the Department of Justice regulations) required that a copy of the Department's recommendation to the Appeal Board be sent to the registrant and in sufficient time for him to rebut any adverse conclusions or evidence therein, or at all. The fact is that the registrant was never sent copies of the recommendation until *after Gonzales*, supra. See Appendix "A." *Gonzales* was decided March 14, 1955; Evans' Appeal Board received the Department's recommendation on August 2, 1954 [Ex 29]. The procedure, having been found wanting, a number of pending cases have been reversed, as in *Cooper*, supra.⁸ Since the recommendation in Evans' case was never given him, and was adverse to his claim, and resulted in an adverse decision on his appeal, it is submitted that for this alone, the judgment should be reversed.

In view of the fact that there is no contradictory relevant evidence in the file, disputing appellant's statements as to his conscientious objections, and there is no question of veracity presented, the problem to be determined here by this Court, appellant repeats, is one of

⁸Other reversals, relying on *Gonzales*:

Duron vs. United States, 9th Cir., 221 F. 2d 187;

Bradley vs. United States, (from Ninth Circuit), 75 S. Ct. 532;

Arndt vs. United States, 222 F. 2d 484, 488.

Reversals using *Gonzales*, among other reasons:

United States vs. Mungo, 7th Cir., 221 F. 2d 479;

In *Nelson vs. United States*, 221 F. 2d 623, the Seventh Circuit worried over the fact that Nelson hadn't asked for a summary but concluded that the language in *Gonzales* precluded the application of waiver. [625-6].

law rather than one of fact. The question to be determined is: Was the decision (that the evidence did not prove appellant was a conscientious objector opposed to both [or either] combatant and noncombatant military service) arbitrary, capricious and without basis in fact?

The undisputed documentary evidence in the file showed that the appellant was conscientiously opposed to participation in combatant and noncombatant military service. This showing brought him squarely within the statute and the regulation providing for classification as a conscientious objector. This entitled him to exemption from combatant and noncombatant military training and service.

There is absolutely no evidence whatever in the draft board file that appellant was willing to do military service. All of his papers, and every document supplied by him, staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. Never, at any time, did the appellant suggest to the Selective Service System, or even imply, that he was willing to perform any military service. He, at all times, contended that he was unwilling to go into the armed forces and do anything as a part of the military machinery.

It has been held by many courts of appeal that the rule laid down in *Dickinson vs. United States*, supra, (holding that if there is no contradiction of the docu-

mentary evidence showing exemption as a minister, there is no basis in fact for the classification) also applies in cases involving other claims.

- Weaver vs. United States*, 8th Cir., 1954, 210 F.2d 815, 822-823;
Taffs vs. United States, 8th Cir., 1953, 208 F.2d 839, 331-332;
United States vs. Hartman, 2d Cir., 1954, 209 F.2d 366, 368, 369-370;
Pine vs. United States, 4th Cir., 1954, 212 F.2d 93, 96;
Jewell vs. United States, 6th Cir., 1953, 208 F.2d 770, 771-772;
Schuman vs. United States, 9th Cir., 1953, 208 F.2d 801, 802, 804-05;
Jessen vs. United States, 10th Cir., 1954, 212 F.2d 897, 900;
United States vs. Close, 7th Cir., 1954, *supra*;
United States vs. Wilson, 7th Cir., 1954, 215 F.2d 443, 446;
contra United States vs. Simmons, 7th Cir., 1954, 213 F.2d 901.

Simmons was reversed by the Supreme Court on March 14, 1955, *Simmons vs. United States*, 75 S.Ct. 397. The reversal was on other grounds, however and it remained for *Witmer*, 75 S.Ct. 392, to settle the point. In *Witmer*, it was held that the inconsistent statements and positions of the registrant, gave the Selective Service System a basis in fact for disbelieving his

sincerity and denying his claim for a conscientious objector classification. The Court referred to the Department of Justice findings that Witmer had retreated from one deferred claim to another (for a total of three claimed statuses) and had made inconsistent statements, and had offered to contribute to the war effort [395].

Appellant Evans' file cannot be fairly charged with containing any of the above flaws. He was entitled to at least a I-A-O conscientious objector classification. That he might have turned it down, was no excuse for not giving it to him. See *Franks vs. United States*, 9th Cir., 216 F.2d 266, 269.

In *Jessen vs. United States*, 10th Cir., 1954, supra, 900, after quoting from *Dickinson*, supra, the Court said:

“Here, the uncontroverted evidence supported the registrant's claim that he was opposed to participation in war in any form. There was a complete absence of any impeaching or contradictory evidence. It follows that the classification made by the State Appeal Board was a nullity and that Jessen violated no law in refusing to submit to induction.”

In our search of appellant Evans' file for possible impeaching or contradictory evidence, let us again revert to the *Witmer* yardstick. Witmer claimed he was a minister *after* he was denied an agricultural deferment [396]. Evans, after his conscientious objector

claim was rejected, specifically pointed out that he was not a minister, or even a sect "member," by frankly spelling out the sect's standard: "You must work at it." At every turn, Evans frankly set forth the facts but staunchly maintained, "but that doesn't change the way I believe." [Ex 48]. What more can a conscientious objector do? Ministers do public acts; so do farm workers, students. A conscientious objector *believes*, and governs his professions and conduct accordingly. The relevant evidence is all on *one* side, Evans'. His veracity was never questioned.

There must be an affirmative finding that his evidence lacked credibility. "It is hard to see how the board could have refused a deferment under the case of *Dickinson vs. United States*, 346 U.S. 389, unless there was an affirmative finding that the evidence lacked credibility." *United States vs. Williams*, No. 8917 Criminal, D. Conn., April 2, 1954, Judge J. Joseph Smith. And see *United States vs. Peebles*, 7th Cir., 220 F.2d 114, 119, and cases cited. Also *Weaver vs. United States*, supra, *Jewell vs. United States*, supra, *Hagaman vs. United States*, 3d Cir., 213 F.2d 86, *United States vs. Izumihara*, D. Hawaii, 120 F.Supp. 36, *United States vs. Close*, 7th Cir., supra.

This phase of Evans' case is similar to two cases decided by this Court in 1954. In *Shepherd vs. United States*, 9th Cir., 217 F.2d 942, we read:

"However, this case differs in an important particular from the Hinkle case where we pointed

out that there was no suggestion of any sham or fakery on the part of Hinkle whose beliefs and views were admittedly sincere and genuine. Here it is to be noted the Department's recommendation of a denial of exemption was based upon a disbelief in Shepherd's honesty and sincerity as well as upon the legal conclusions that he could not be a conscientious objector because of his belief in self defense and in theocratic war." [945]

Substitute the particular artificial tests used to judge Evans [see Point III, hereinafter] for "self-defense" and "theocratic war" and the situations are identical.

Even where it could be said the appeal board might have found against an appellant on a legal basis the presence of the illegal ones in the advice of the Department compels the conclusion the classification is tainted. See *Batelaan vs. United States*, 9th Cir., 217 F.2d 946, 947-8. Nor does the doctrine of official regularity aid the appeal board classification: see *Shepherd*, supra, page 946, *because these are criminal cases*.

The boards should be told they must record more of their classification facts and bases. At least one district judge has spelled this out. In *United States vs. Christensen*, S.D. Calif. No. 23,220, Judge Westover, on December 28, 1953, said:

"This court has heretofore held that each classification is a new and separate classification; that neither the appeal board nor the Presidential

Board affirms or denies a classification made by the local board, but that each is a new classification and makes moot all former classifications (*United States vs. Lynch*, 115 F.Supp. 735). We have also held that an appeal presents each and every issue to the appeal board (*U.S.A. vs. Oakes*, #23,188, November 30, 1953). Consequently, in the case at bar the state appeal board and the Presidential Appeal Board had before them the claim that registrant was entitled to a ministerial classification. If the appeal board or the Presidential Appeal Board considered registrant's claim that he was entitled to a minister classification, there is no indication of such consideration in the selective service file. If the appeal board and the Presidential Appeal Board did not consider registrant's claim that he was a minister, then the classification of the appeal board and of the Presidential Appeal Board were arbitrary classifications. If they did consider registrant's claim, then some record should have been made of that fact."

POINT III.

THE LAW DOES NOT PERMIT DENIALS OF CLASSIFICATIONS TO BE BASED ON THE TESTS APPLIED TO THIS APPELLANT.

Congress provided that registrants, professing to be conscientious objectors to participation in warfare, be exempted from military service; Section 6(j) of the Act, *supra*. The tests to be applied are set forth in said section.

The tests applied by the Selective Service System were ones not set forth in the law. They were arbitrary and artificial. The Selective Service System is to classify, not to penalize. The tests actually used are found on page 54 of the Exhibit, the selective service file. The tests were:

- 1) His willingness to haul "construction" material;
- 2) His expressed unwillingness to aid wounded soldiers;
- 3) His views on self-defense;
- 4) His ownership of a hunting rifle, his activity as a hunter and his unwillingness to use the rifle in warfare.

At the hearing he was also asked if fear was his motive. This is a proper test, and where some evidence exists, could be a legitimate basis for disallowing a conscientious objector claim; however, the board's summary of the dialogue does not in the least indicate that his answer or his demeanor on this test was con-

sidered to be damaging to his claim. We cannot speculate that the board *might* have questioned the appellant's veracity on this test and might have concluded from this that his claim was insincere or based on cowardice. Even so the mere asking of a question is not evidence. In addition there must be an affirmative finding and a recordation, as was shown herein-above under Point II, citing *Dickinson*, *Williams*, *Peebles*, *Weaver*, *Jewell*, *Hagaman*, *Izumahara*, and *Close*. The language of Mr. Justice Jackson in *Dickinson* is "The board must find and record affirmative evidence . . . in short, the board must build a record." [159].

No legitimate standard was actually applied. "If anything which occurred at that interview, including Ashauer's demeanor or the manner in which he conducted himself, was inconsistent with or derogative of his avowal of conscientious objection, there is no hint of it in the board's memorandum regarding the interview." This quotation is from *Ashauer vs. United States*, 9th Cir., 217 F. 2d 788, 791.

The Department of Justice recommendation to the appeal board is found on pages 29-31 of the Exhibit. It reveals that these same four tests were used with four additional ones, namely, that the appellant

- 5) Admitted he had been slack in the duties of his ministry (Ex 30). This was a particularly irrelevant test, for the Department of Justice is not concerned with the IV-D, ministerial

classification, but only with the I-O and I-A-O conscientious objector's classifications.

- 6) Unwillingness to accept either combatant or noncombatant duties.
- 7) Unwillingness to perform I-O type work.
- 8) Smoking and drinking.

These tests will be considered *seriatim*.

It is appellant's position that none of the standards used in classifying him or tests used in denying his claimed classifications were legitimate. Some doubtless need little or no argument. Appellant will try not to belabor those particular ones in his Opening Brief.

1) His willingness to haul "construction" material:

First, Congress did not tend to allow an inquest to be held as to the kind of work that a registrant did or was willing to do. Congress intended to protect every person who has conscientious objections, based upon religious grounds, to participation in war in any form. Congress did not make the factors relied upon any basis in fact for the denial of the conscientious objector claim.

United States vs. Wilson, 7th Cir., 1954, *supra*, 446;

Franks vs. United States, 9th Cir., *supra*;

Hinkle vs. United States, 9th Cir., 216 F. 2d 8;

Goetz vs. United States, 9th Cir., 216 F. 2d 270.

The standards used below are based on an unreasonable interpretation of Section 6(j) of the Act, extended to forfeit the status if the objector is willing to engage in "indirect participation." The proper interpretation of the Act should limit consideration to participation in military service with the word "direct". If consideration of work that the objector is willing to do is not limited to direct participation, but extends to indirect participation, then the conscientious objector can be denied his status unless he refuses to do anything in any way indirectly contributing to the war effort. In time of total war every civilian is indirectly geared to, and participates in the war effort whether he likes it or not. The construction placed upon the Act by the classifying authorities completely nullifies the provisions of the Act that conscientious objectors do civilian work contributing to the war effort. Congress did not intend to be so unfair or unreasonable.

The classifying authorities' attitude is subversive of the intention of Congress. It ignores completely the criterion of opposition to participation in the armed forces. It injects the vague and indefinite dragnet of parochial notions into the statute, nullifying completely the plain purpose of Congress in passing the law.

Congress was dealing only with raising an army. Exemption from becoming a soldier was given to many different classes of registrants who contributed to the war effort. The performance of a certain type of work outside the army deferred most of the ones ex-

cused from training and service. Pursuit of the vocation of minister is an outstanding exemption. Farming, essential work in the national defense industry, and service to the state or federal governments in different capacities are the most common exemptions. The status of severe hardship and conscientious objection are other deferments and are not based on occupation or work.

Deferment based on hardship or conscientious objection does not at all depend on the type of work that the registrant is willing to perform. The statute nowhere makes the kind of work done by a registrant, claiming deferment as a conscientious objector before induction, an element to consider. The only time that the type of work performed, or willing to be performed by a conscientious objector, is material (and then it is after induction, and not work before induction that is involved) is when it is shown that he performs combatant service or is willing to perform combatant service. Then and only then can it be said that the service performed, or willing to be performed by the registrant, disproves conscientious objection to service.

Congress did classify the type of work that a conscientious objector can be drafted to do. It is anything that contributes to the health, safety and welfare of the nation. So long as it is of a civilian nature, it must be done when ordered by the draft board. What is there in the Act or the Regulations to prevent a draft board from ordering a conscientious objector to do work in a war plant? Nothing! Concerning the

similar provision for work by conscientious objectors under the 1940 Act, it is said, “ . . . that the Act did not even guarantee that the objector would not be assigned to do work connected with the war effort.” (Sibley and Jacob, *Conscription of Conscience*, Cornell University Press, Ithaca, New York, 1950, p. 50). Since a conscientious objector could be ordered to do work of a civilian nature, contributing to the national welfare in a defense plant, then how can the government now say that because a man says he is willing to haul “construction” material, he is not a conscientious objector? Such an argument is incongruous and leads to unreasonable and harsh results. Nevertheless, since this Court has indicated that certain occupations are so close to warfare that they may be used in determining the sincerity of the registrant, appellant must comment on this matter. Hauling “construction” material is not the equivalent of manufacturing munitions of war, the criterion used by this Court in *White vs. United States*, 215 F. 2d 782, 786. Evans’ work was far removed from the kind of work that could fairly be considered inconsistent with his professions of conscience. White apparently was engaged in the manufacture of munitions. (pages 785-786). This Court, in its denial of the government’s Petition for Rehearing in [Roger] *Clark vs. United States*, 217 F. 2d 511, said:

“We find no resemblance between this case and the *Witmer* case. The *Witmer* case, like our cases of *White vs. United States*, 215 F. 2d 782, and *Tomlinson vs. United States*, 216 F. 2d 12, was one in which it was clear that the registrant had

been denied a conscientious objector classification upon the simple determination that he was not sincere. The facts relating to Clark are very different. The record here discloses not only that there was *no determination of insincerity* on the part of Clark but the action of the appeal board *followed* the receipt of erroneous advice from the Department of Justice that in view of registrant's willingness to use force in self defense, defense of family and fellow church members, and concerning his employment by an establishment which served persons engaged in furthering the military effort, he could not be classified as a conscientious objector." [Emphasis supplied.]

Nowhere does the law authorize the Selective Service System and the Department of Justice to invent fictitious and foreign standards and use them to speculate against evidence and facts that are undisputed.

Sicurella vs. United States, 75 S. Ct. 403;

Annett vs. United States, 10th Cir., 1953, 205 F. 2d 689;

Hinkle vs. United States, 9th Cir., *supra*;

Clementino vs. United States, 9th Cir., 216 F. 2d 10;

United States vs. Alvies, N.D. Cal. S.D., 1953, 112 F. Supp. 618, 260, 623-624;

United States vs. Graham, W.D. Ky., 1952, 109 F. Supp. 377, 378;

United States vs. Everngam, D. W.Va., 1951, 102 F. Supp. 128, 130-131;

Dickinson vs. United States, *supra*;

United States vs. Hartman, 2d Cir., 1954, supra, 369, 371;
Schuman vs. United States, 9th Cir., 1953, supra, 802, 805;
Weaver vs. United States, 8th Cir., 1954, supra, 823;
Lowe vs. United States, 8th Cir., 1954, 210 F. 2d 823;
United States vs. Lowman, W.D. N.Y., 1954, 117 F. Supp. 595, 598;
United States vs. Benzing, W.D. N.Y., 1954, 117 F. Supp. 598.

The classifying authorities, in defiance of the intent of Congress by a strange and unreasonable interpretation of the Act, now would force all conscientious objectors to go on a sit-down strike and do absolutely nothing, either directly or indirectly, that might conceivably contribute to the war effort, in order to preserve the freedom from participation in the armed forces granted to them by Congress.

2) His expressed unwillingness to aid wounded soldiers is an irrelevant fact.

If anything, this attitude is but a carrying to its logical conclusion his "I-O" position. A I-A-O type conscientious objector is one who has a religious antipathy to personally killing human beings in warfare but not to participating in military activity that merely aids others to do so. The I-O type has a "complete" antipathy to military activity and therefore cannot

conscientiously put back on the firing line a man trained to kill.

This point hardly needs any argument. Whatever dislike one may have for the objector purist who says he would not aid a wounded soldier, it is required that we adopt, at least, the judicial detachment expressed by Judge Picard in *United States vs. Kobil*, No. 32390, E.D. Mich., September 13, 1951:

“That is wrong; absolutely wrong and un-American. The boards might as well find it out now as at any time.

“Now, the fact that this man won’t salute the flag makes my blood boil; and that he won’t fight for his country also makes my blood boil. But that hasn’t anything to do with this, with you and me. I am the Judge; I have got to follow the law as it is in making a decision—not my natural tendencies, because he probably would have been in jail long ago if I had been permitted to follow my natural tendencies. That isn’t it.

“I want to look at this from the angle that I believe I should as a Judge.”

Nor can it be argued that appellant, by expressing unwillingness to aid wounded soldiers was waiving a I-A-O classification and thus nullifying the argument he makes here that his evidence showed he was entitled to at least such a classification. This Court has flatly stated that this is not a waiver and that such a denial is unjustified:

“We are not unaware of the high probability that Franks, had he been classified I-A-O, would

nevertheless have refused induction and ultimately found himself indicted. . . . It is our view, however, that it was not for the local board, any more than it is for this Court, to say that the registrant should not be placed in a certain classification merely because he did not want that classification or was seeking a lower class or would probably refuse to acquiesce in such a classification." *Franks*, *supra*, page 269.

3) His views on self-defense are irrelevant.

This point, too, hardly needs argument but two minutes on it may be justified because the cases cited also bear on other points. It is true that there was a time, before this Court spoke in 1954 and the Supreme Court spoke in 1955, when it was believed by the Selective Service System, the Department of Justice, and many district judges that a conscientious objector, by definition, was required to be a pacifist; that a belief in self-defense negated the sincerity of the registrant's expressions of religious conscientious objection to participation in warfare. Although the 2d and 8th Circuits had the opportunity to lead the way⁹ this Court held that the Act did not proscribe a belief in self-defense as soon as the question came before it. See *Clark vs. United States*, 217 F. 2d 511. In this [Roger] *Clark* decision this Court also eliminated war-connected work as a legitimate standard for denying a conscientious objector classification:

⁹*United States vs. Pekarshi*, 207 F. 2d 930 (C.A. 2d 1953); *Taffs vs. United States*, *supra*, 331.

“The Hearing Officer believed that registrant was a sincere church member, but his statements on force and employment connected with war effort, in the Hearing Officer’s opinion, precluded him from classification as a conscientious objector under the law. Accordingly, he recommended a I-A classification.”

“It must be concluded that no portion of that which was thus before the appeal board furnished any basis for that board’s rejection of a conscientious objector’s exemption, at least so far as the conscientious objection to combatant military service is concerned.”

Hinkle, Franks, and Goetz, all *supra*, are cited. Also see *Shepherd vs. United States*, 9th Cir., *supra*, and *Batelaan vs. United States*, 9th Cir., *supra*. These cases are additionally important to this appellant because of the holding that the existence of an illegal basis for the Department of Justice’s recommendation to the appeal board tainted the classification, although there was also present in the files *express* disbeliefs in those registrants’ honesty and sincerity. Appellant submits that his position is better than *Shepherd’s* or *Batelaan’s*, for no *classifying* agency expressed a disbelief in his honesty or sincerity. The expressions of disbelief in his sincerity by some of the faceless *informants* has been dealt with previously. On this point also see *Hagaman vs. United States*, *supra*.

4) Ownership of hunting equipment, etc., is also irrelevant.

Although there is only one appellate decision that has considered this narrow point, this Court's "self-defense" cases, [Roger] *Clark*, etc., *supra*, would seem to cover it. Appellant believes that only a vegetarian can logically require an unwillingness to take animal life for food as a basis for conscientious objection to participation in warfare.

The Tenth Circuit has squarely decided this point in *Rempel vs. United States*, 220 F. 2d 949:

"And the hunting for wild game is not a circumstance having any probative force in respect to the lack of good faith of an asserted claim of exemption under the statute." [952].

5) Slackness in religious duties, is immaterial.

It is not necessary that a registrant be a regular attendant at church (or attend at all) to be a genuine conscientious objector. This Court has never passed squarely on the point, but it indicates in *Chernekoff vs. United States*, 219 F. 2d 721, that saintliness is not required of a registrant professing religious objection to war [724]. The Tenth Circuit came to the same conclusion in *Rempel vs. United States*, *supra*, at 951, citing *Chernekoff*. A district court, however, has been squarely faced with this point. Judge Stephen W. Brennan, in *United States vs. Lewis C. Keefer*, N.D. N.Y., decided August 2, 1956, said:

“The question here is the sincerity of the registrant’s belief which must have been influenced by training and experience. Church membership, activity, or lack of them, are not determinative. (32 C.F.R. 1622.1(d); *Annett vs. U. S.*, 205 F. 2d 689).”

It is true that the witnesses require regularity in attendance and in missionary work of one who wants to be considered a witness, that is, *a minister of Jehovah*; however, as appellant himself stated, “. . . but that doesn’t change the way I believe.” [Ex 48]. It should need no argument that there is no *necessary* connection between regular church attendance and religious belief, for, as in this instance, one’s vocation may preclude regular attendance. The non-sequitur nature of such a test was well summed up by District Judge John Paul in *United States vs. John Henry Showalter*, No. 8674, W.D. Va., decided December 3, 1952:

“In comment on the above it may be said, in the first place that the court is unable to see any connection between holding conscientious convictions against engaging in war and drinking a bottle of beer or witnessing a moving picture. Even if this mild dissipation were considered as violating cardinal precepts of the Mennonite Church it does not follow at all that one indulging in them cannot adhere to others of its principles.”

6) Unwillingness to accept either combatant or noncombatant duties.

The argument hereinabove presented, citing the *Franks* and *Kobil* cases, is adopted as appellant's argument on this point.

7) Unwillingness to perform I-O type work.

The argument hereinabove presented, under III 1), and the argument under III 2) citing the *Franks* and *Kobil* cases, are adopted as appellant's argument on this point.

8) Smoking and drinking.

The argument hereinabove presented, under III 5), is adopted as appellant's argument on this point.

Summary of Argument III: Appellant contends the record shows illegal bases alone were used in classifying him; his final contention, however, is that even where the record shows that a classification *may* have been based on a legal standard, it is illegal if the record also shows the possible use of an illegal standard and no explanation is given by the classifying authorities that rules out the use of illegal, erroneous interpretations of the applicable law; *Ypparila vs. United States*, 10th Cir., 219 F. 2d 465, 469, and this Court's *Shepherd*, supra, *Batelaan*, supra, and the opinion on the Petition for Rehearing in *Sheppard vs. United States*, 220 F. 2d 855, 856.

CONCLUSION

The judgment of the Court below should be reversed.

Respectfully submitted,

J. B. TIETZ,
Attorney for Appellant.



APPENDIX

December 19, 1956

National Headquarters
Selective Service System
1712 G Street, N.W.
Washington 25, D.C.

Gentlemen: Att: General Counsel

From time to time I represent selective service registrants who profess conscientious objections to war. It has been my observation that both your agency and the Department of Justice have changed the procedures somewhat, during the last past four years, with respect to the special appellate procedures for these registrants.

I have been attempting to establish the date, as accurately as possible, when they first were furnished with copies of the Attorney General's recommendation to the Appeal Board. I made an inquiry, addressed to the attention of Mr. T. Oscar Smith, Chief, Conscientious-Objector Section, as follows:

" . . .

"Please send me all subsequent changes and particularly the one or more that confirm my belief that the practice of sending copies of your recommendations to the Appeal Board started after the Gonzales (75 S.Ct. 409) decision. My purpose in asking for this particular item is to establish this as a fact."

His reply suggested that I "contact the Selective Service System for that information."

Very truly yours,
J. B. TIETZ

JBT:je

JAN 7 1957

Mr. J. B. Tietz
Attorney at Law
410 Douglas Building
So. Spring and Third Streets
Los Angeles 12, California

Dear Mr. Tietz:

This is in reply to your letter of December 19, 1956, requesting information as to when registrants, who claim to be conscientious objectors and who appeal to the appeal board, were first furnished copies of the Department of Justice's recommendation prior to classification by the appeal board.

You are correct in assuming that this procedure was instituted as a result of the decision of the Supreme Court in the case of Gonzales v. United States, 348 U.S. 407, 75 S.Ct. 409. As a result of this decision the Selective Service Regulations were amended by Executive Order No. 10659 of February 15, 1956. Consequently, section 1626.25 (c) of the regulations now requires that the registrant be given an opportunity to reply to the recommendation of the Department of Justice prior to classification by the appeal board.

For The Director,
DANIEL O. OMER
DANIEL O. OMER
Colonel, JAGC
General Counsel

No. 15385

In the
United States Court of Appeals
For the Ninth Circuit

DICK LEE EVANS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

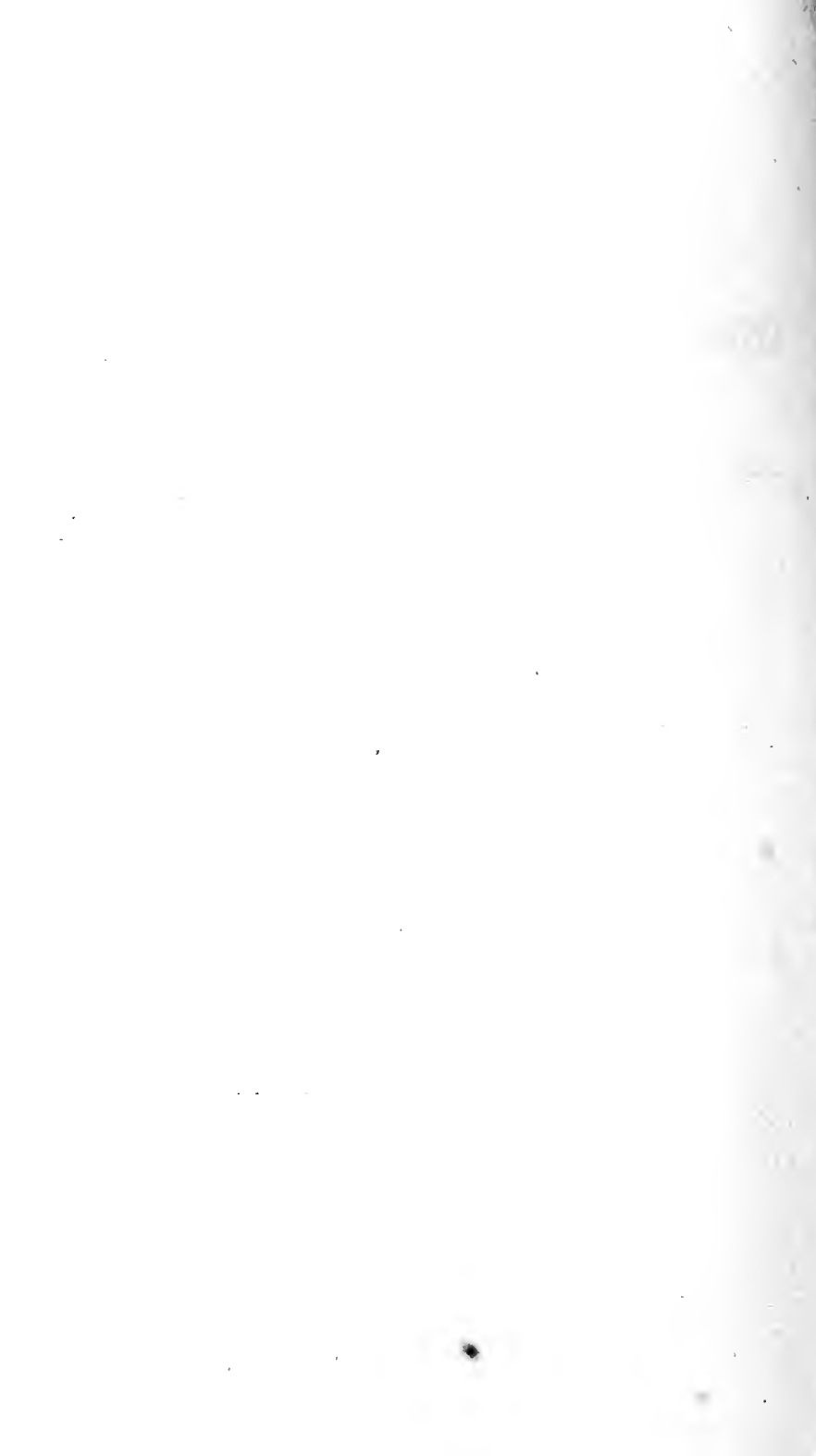
Petition for Rehearing

J. B. TIETZ

410 Douglas Building
S. Spring & Third Streets
Los Angeles 12, California
Attorney for Appellant.

FILED

MAR 24 1958



In the
United States Court of Appeals
For the Ninth Circuit

DICK LEE EVANS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 15385

Petition for Rehearing

Comes now the appellant, by his attorney, and files this his Petition for Rehearing of Judgment entered by the Court on February 24, 1958, affirming the judgment of the court below.

Appellant reserves his argued position as to each of the points of appeal, but in this petition addresses himself solely to certain features of the decision wherein he believes the Court may be convinced its opinion is incorrect.

THE RULE REQUIRING EXHAUSTION OF ADMINISTRATIVE REMEDIES SHOULD BE RELAXED IN THIS INSTANCE.

Such a holding would have support in this Court's *Davidson* decision.

It will be recalled that Evans appealed his first I-A classification, but did not appeal the second I-A.

Petitioner's reclassification (in the same Class, I-A) was not the result of any new evidence, but (as the Court relates on page 2 of the slip opinion) because it was believed by the Selective Service System that the *Gonzales* decision required a reprocessing.

A study of the "new" material placed in the file after the reopening of the classification, compared with the material that formed the basis for the original I-A classification shows that nothing new was added. The sheets of paper were new to the file, but the writing on the said sheets added no new content whatsoever.

This is exactly parallel to the *Davidson* situation, where this Court declared:

"The record submitted to the appeal board contained nothing new which could affect its prior decision." (611-612 of 218 F. 2d.)

The merits of petitioner's case should be considered. He should not be foreclosed by a strict construction of the harsh "exhaustion" rule.

Wherefore, upon the foregoing grounds, and for other reasons appearing in Appellant's Brief, it is respectfully urged that a rehearing be granted in this matter, and that the mandate of this Court be stayed pending the disposition of this petition.

Counsel further represents and certifies: In counsel's judgment this Petition is well founded and is not interposed for delay.

J. B. TIETZ,
Attorney for Appellant.

No. 15385

United States
Court of Appeals
for the Ninth Circuit

DICK LEE EVANS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

FEB - 8 1957

PAUL P. O'BRIEN, CLERK



No. 15385

United States
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for the Ninth Circuit

DICK LEE EVANS,

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Transcript of Record

Appeal from the United States District Court for the
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Central Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

J. B. TIETZ,
257 South Spring Street,
Los Angeles 12, California.

For Appellee:

LAUGHLIN E. WATERS,
U. S. Attorney;

LOUIS LEE ABBOTT,
Asst. U.S. Attorney, Chief, Criminal Division;

JOHN K. DUNCAN,
Asst. U. S. Attorney,
600 Federal Building,
Los Angeles 12, California.

United States District Court for the Southern
District of California, Central Division

No. 24959-CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DICK LEE EVANS,

Defendant.

INDICTMENT

[U.S.C., Title 50, App., Sec. 462-Universal Military Training and Service Act.]

The grand jury charges:

Defendant Dick Lee Evans, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 115, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on December 6, 1955, in Los Angeles County, California, in the division and district aforesaid; and at said

time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly [2*] failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.

A True Bill,

/s/ GEORGE DIETZLER,

Foreman.

/s/ LAUGHLIN E. WATERS,

United States Attorney.

[Endorsed]: Filed April 25, 1956. [3]

[Title of District Court and Cause.]

STIPULATION RE SELECTIVE
SERVICE FILE

It Is Hereby Stipulated and Agreed by and between the United States of America, plaintiff, and Dick Lee Evans, defendant, in the above-entitled matter, as follows:

That it be deemed that Edith P. Kunz was called, sworn and testified as follows:

1. She is a Clerk employed by Local Board No. 115; Selective Service System, United States Government.

2. The defendant, Dick Lee Evans, is a registrant of said Local Board No. 115.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

3. As Clerk of said Local Board No. 115, is legal custodian of the original Selective Service file of defendant.

4. The Selective Service file of defendant, Dick Lee Evans, is an official record kept in the regular course of business by said Local Board No. 115, and it is the [4] regular course of said Local Board No. 115's business to make such a record at the time of each act, transaction, occurrence or event noted in the said Selective Service file, or within a reasonable time thereafter.

It Is Further Stipulated that the photostatic copy of the said original Selective Service file of Dick Lee Evans, marked "Government's Exhibit 1" for identification, is a true and accurate copy of the said original Selective Service file of defendant.

It Is Further Stipulated that the photostatic copy of the said original Selective Service file of defendant, Dick Lee Evans, marked "Government's Exhibit 1" for identification, may be introduced in evidence in lieu of the said original Selective Service file.

Dated: July 23, 1956.

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division;

/s/ JOHN K. DUNCAN,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

/s/ J. B. TIETZ,
Attorney for Defendant.

/s/ DICK LEE EVANS,
Defendant.

It Is So Oredered: This 23rd day of July.

/s/ THURMOND CLARKE,
United States District Judge.

JKD:cr

[Endorsed]: Filed July 23, 1956. [5]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL

May It Please the Court:

Now comes the defendant and moves the Court for a judgment of acquittal for each and every one of the following reasons:

1. There is no evidence to show that the defendant is guilty as charged in the indictment.

2. The Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment.

3. The denial of the conscientious objector status by the Selective Service System and the recommendation by the Hearing Officer to the Department of Justice and by the Department of Justice to the board of appeals were each without

basis in fact, arbitrary, capricious and contrary to law.

4. The report of the Hearing Officer, relied upon by the Department of Justice and the board of appeals, is arbitrary, capricious and illegal because it refers to artificial, fictitious and [6] unlawful standards not authorized by the Act and Regulations and advises the appeal board to classify according to irrelevant and immaterial lines in determining that the defendant was not a conscientious objector when a pursuit of the Act and Regulations was the only thing for the Hearing Officer and the appeal board to follow.

Respectfully submitted,

/s/ J. B. TIETZ,

Attorney for Defendant.

July 24, 1956.

[Endorsed]: Filed July 23, 1956. [7]

United States District Court for the Southern
District of California, Central Division
No. 2459-Criminal (CD)

UNITED STATES OF AMERICA,

vs.

DICK LEE EVANS.

JUDGMENT AND COMMITMENT

On this 6th day of August, 1956, came the attorney for the government and the defendant appeared in person and J. B. Tietz, his Attorney.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty, and a finding of Guilty of the offense of knowingly fail and neglect to be inducted into the Armed Forces of the United States as so ordered and notified to do under the Universal Military Training and Service Act, in violation of Title 50, App., U. S. C., Sec. 462, as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three Months.

Bond of the defendant is ordered exonerated.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

[Seal] /s/ THURMOND CLARKE,
United States District Judge.

[Endorsed]: Filed August 6, 1956. [8]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, Dick Lee Evans, resides at 2711 E. 111th Street, Lynnwood, California.

Appellant's attorney, J. B. Tietz, maintains his office at 410 Douglas Building, 257 South Spring Street, Los Angeles 12, California.

The offense was failing to submit to induction, U. S. C., Title 50 App., Sec. 462—Selective Service Act, 1948, as amended.

On August 6, 1956, after a verdict of Guilty, the Court sentenced the appellant to three months, confinement in an institution to be selected by the Attorney General.

I, J. B. Tietz, appellant's attorney, being authorized by him to perfect an appeal, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

/s/ J. B. TIETZ,
Attorney for Appellant.

[Endorsed]: Filed August 6, 1956. [10]

[Title of District Court and Cause.]

EXTENSION OF TIME

(With Stipulation)

For good cause shown, defendant is hereby given 45 additional days, to and including October 26, 1956, to prepare and docket the record on appeal.

Dated: September 4, 1956.

/s/ THURMOND CLARKE,
Judge.

The appellee stipulates to the above-requested extension of time.

LAUGHLIN E. WATERS,
United States Attorney;

By /s/ JOHN K. DUNCAN,
Assistant U. S. Attorney.

[Endorsed]: Filed September 4, 1956. [13]

In the United States District Court, Southern
District of California, Central Division

No. 24759-Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DICK LEE EVANS,

Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Monday, July 23, 1956

Appearances:

For the Plaintiff:

LAUGHLIN E. WATERS,

United States Attorney; by

JOHN DUNCAN,

Assistant United States Attorney.

For the Defendant:

J. B. TIETZ,

410 Douglas Building,

South Spring and Third Streets,

Los Angeles 12, California.

Honorable Thurmond Clarke, Judge Presiding.

Monday, July 23, 1956—3:40 P.M.

The Court: United States versus Evans.

Go ahead. I have the file.

Mr. Duncan: May the record show that the defendant, Dick Lee Evans, and his attorney are present in court, your Honor?

The Court: Yes.

I have the file, and I have the trial brief.

Mr. Duncan: The Government at this time, your Honor, will present a stipulation which admits Government's Exhibit for Identification No. 1 into evidence.

The Court: All right.

(The document heretofore marked Plaintiff's Exhibit 1 was received in evidence.)

Mr. Duncan: The Government rests.

The Court: The Government rests.

Mr. Tietz: The defendant has filed a motion for a judgment of acquittal.

I would like to be heard very briefly at this time, although I think it would be preferable to leave the real argument to the end of the case so that there might be one argument on the merits.

The Court: All right.

Mr. Tietz: The United States Attorney has put his [3*] finger, in his brief, on a threshold point that is of crucial importance to this case and one that, in this form, has never before arisen, in my opinion. I have participated in practically all of the cases that have had this point in them in the Circuit, and they have all been different than what we have here. If the Court decides against the de-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

fendant on this point, as the United States Attorney urges, then of course he won't be able—he won't be in position to present his other defenses. In other words, he has forfeited the right, by the failure to take an administrative appeal from the second 1A classification.

On the other hand, it is a point of first impression. All the cases I cited and all the other cases on the subject, and there are quite a few, are instances where an individual, as this particular defendant, didn't take an administrative appeal or didn't report at the induction station for the induction ceremony. In some cases, like in the Williams case, cited by the United States Attorney, Williams didn't do either but he was out on both grounds.

This particular defendant stands in a quite different position, in my opinion, before this Court, in that he did take an appeal from the 1A classification, and then in 1954 when his classification was reopened to put him back in the same classification he took no appeal because it would have been a futile thing. [4]

I therefore submit to the Court, and I would like to argue it briefly or at as much length as the Court may wish, that he has exhausted his administrative remedies.

(Whereupon, oral argument was had, which argument was reported but is not here included, by request of Mr. Tietz.)

The Court: I will deny the motion at this time.

Do you want to put on some testimony? Then I will hear from you at a later date.

Mr. Tietz: Yes.

The Court: I will take the testimony while you are here, and then hear your argument next Monday or sometime, because we have such a big calendar.

Mr. Duncan: I believe the question Mr. Tietz has put to the Court is that there might be no necessity for taking testimony. Mr. Tietz has readily admitted that the point he has raised is a unique point; that there was no reason for this defendant to appeal——

The Court: I thought while he is here, let's take the testimony and then pick up the argument next Monday. You know the calendar we have today and tomorrow.

Mr. Duncan: If your Honor would rule on this point, it might be that no testimony would be required. I think that is the point Mr. Tietz is seeking to make by asking your Honor to rule on the point he has raised. [5]

The Court: Well, I have just denied the motion for acquittal at this time. Then you said you wanted to put on some testimony now.

Mr. Tietz: Yes.

The Court: You want to argue the point at length later on, you said.

Mr. Tietz: That is one way of going about it. The testimony is very short.

The Court: We can take the testimony and then hear the argument later on.

Mr. Duncan: Your Honor, I will object to any testimony that is offered, on the basis that it would be irrelevant. Since this defendant did not exhaust his administrative remedies, there is truly nothing before this Court. This man hasn't gone to the Selective Service system to determine what his classification should be.

The Court: I know, you raise that point. But let's take the testimony and then argue the matter later on. That is my thought. We got started late. We have jury trials tomorrow. We have had a terrific calendar today. I thought I would take the testimony and have you write a brief on the subject. I have to go ahead with these trials tomorrow. We have had a terrific day today.

Mr. Duncan: My point is that no testimony is properly offered at this stage of the trial. [6]

The Court: Why not take the testimony subject to a motion to strike on your part later on?

Mr. Duncan: As I say, I will object to any question that Mr. Tietz puts to his client.

The Court: You say your testimony is going to be brief?

Mr. Tietz: Yes.

The Court: We can put the testimony on and overrule the objection subject to a motion to strike, and get that behind us.

Mr. Tietz: It should take only a few minutes, your Honor, unless Mr. Duncan has lengthy cross-examination.

The Court: Let's put him on. That is my thought. There was a misunderstanding as to the time of starting this case.

DICK LEE EVANS

being the defendant herein, called as a witness in his own behalf, being first duly sworn, on his oath was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Dick Lee Evans.

Direct Examination

By Mr. Tietz:

Q. I am going to direct your attention to the occasion you had a hearing before a Hearing Officer of the Department [7] of Justice here in Los Angeles. Do you remember that? A. Yes.

Q. Briefly, what did you and the Hearing officer discuss?

Mr. Duncan: I object, your Honor. That question is irrelevant. There is no issue. This Court is not to attempt to classify this defendant. The only thing before this Court at the present time is whether or not it has any jurisdiction. This defendant didn't exhaust his administrative remedies. The only thing for this Court to determine is his intent in violating the law.

The Court: I am going to overrule the objection and hear the testimony, subject to a motion to strike later on. You have stated your point.

Q. (By Mr. Tietz): Do you remember this? The Court will permit you to answer it.

A. Will you repeat that, please?

Q. You had a conversation with a Hearing Of-

(Testimony of Dick Lee Evans.)

ficer of the Department of Justice in his office, did you not? A. Yes.

Q. Briefly, give us the gist of that conversation.

A. Well, we had a few words back and forth about why I didn't believe in fighting for the country and why I would protect my family at home, whereas I wouldn't go out and get in carnal warfare with another country; and he seemed [8] to think if I would protect my home and family, that also I should protect my country and fight in the governmental war. That is about what he seemed to base his whole conversation on.

Mr. Duncan: I move to strike the answer, your Honor.

The Court: I am going to take the motion to strike later on, after all his testimony is completed, and then take it under submission.

Q. (By Mr. Tietz): Was much time spent by you and the Hearing Officer on any other topic?

A. No, he kept bringing that subject up, and when I would bring up anything else to state my faith he would come back with this same statement. That is all he seemed to think that mattered.

Q. Now I am going to direct your attention to a hearing you had before your Local Board. Do you remember that occasion? A. Yes.

Q. Can you tell us the gist of the discussion that you had with the members of the Local Board at that hearing?

A. Well, they asked me what kind of work I

(Testimony of Dick Lee Evans.)

did, and I was going through that. They said, "Did it have anything to do with any kind of governmental work?"

I said, "Once in a while we might do something. I [9] was a truckdriver at the time, and we might have hauled something that was government property."

So they thought if I would do that, why wouldn't I go to war and do the same thing? And they brought up that same statement of protecting my country and why wouldn't I do that if I would protect my home and family?

Q. Did they ask you about use of firearms or hunting?

A. Yes, they asked me if I had any. I told them I did. They asked me what I used them for. I said I used them for meat in the season, and I didn't do hunting as a sport.

Q. Did they indicate what weight they were giving these particular items in their decisions?

A. Well, me owning a firearm, I guess they thought maybe that would be a reason why, if I would go out shooting a gun for uses like that, that I would be able to go to war and do the same thing. And they thought if I wouldn't protect my country, would I protect my home and family with that same country?

Q. You say "they thought." Did they say something that was directly to that point, or is that something you think they thought?

(Testimony of Dick Lee Evans.)

A. Well, that is what they kept bringing up, that same question.

Mr. Tietz: I see.

You may cross-examine. [10]

The Court: Any questions, Mr. Duncan?

Mr. Duncan: I would move at this time again to strike all of the testimony of the defendant, under the Estep case. This Court is not called upon to classify this defendant. The only thing before this Court—and I do not as yet admit that this is before the Court: Was there any basis in fact for the classification granted by the Selective Service system? I submit that issue is not yet before the Court.

The Court: I will deny the motion to strike, and take the motion under submission. I am not going to rule on the matter right now.

Mr. Tietz: Will the Court hear me on the motion?

The Court: I don't know whether he is going to cross-examine.

Mr. Duncan: May I ask one question?

Cross-Examination

By Mr. Duncan:

Q. You stated, Mr. Evans, that they kept bringing it up with reference to firearms before the Local Board. What do you mean by that?

A. Well, I owned a gun, and they thought—I don't know whether they thought—they kept saying, would I use it in the wars, and I told them no, I didn't have it for that purpose. [11]

(Testimony of Dick Lee Evans.)

Q. What did you tell them you had it for?

A. I told them I used it for hunting; especially deer season, I used to go deer hunting.

Mr. Duncan: I have no further questions.

The Court: That is all. Step down.

That is all the testimony, isn't it, Mr. Tietz?

Mr. Tietz: Yes, your Honor.

The Court: I will continue the matter for further proceedings until next Monday at 2:30 p.m.

Mr. Tietz: Will your Honor hear argument at that time?

The Court: Yes. I will hear the argument at 2:30 p.m., on next Monday. We got started so late on this matter. There was a misunderstanding. We will hear the argument at 2:30 on next Monday afternoon, July 30th. [12]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on Monday, July 23, 1956, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 19th day of October, 1956.

/s/ JOHN SWADER,
Official Reporter.

[Endorsed]: Filed December 4, 1956. [13]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 16, inclusive, containing the original:

Indictment;

Stipulation re Selective Service File;

Motion for Judgment of Acquittal;

Judgment & Commitment;

Application for Bail Pending Appeal;

Notice of Appeal;

Order Permitting Defendant to Leave This Jurisdiction;

Extension of Time (With Stipulation);

Designation of Record;

Extension of Time.

B. I. volume reporter's transcript of proceedings had on July 23, 1956, and Plaintiff's Exhibit No. 1.

I further certify that my fee for preparing the foregoing record amounting to \$1.60, has been paid by appellant.

Witness my hand and seal of the said District Court, this 7th day of December, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy Clerk.

[Endorsed]: No. 15385. United States Court of Appeals for the Ninth Circuit. Dick Lee Evans, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: December 8, 1956.

Docketed: December 13, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15385

DICK LEE EVANS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

Appellant will rely upon the following points in the prosecution of his appeal from the judgment entered in the above-entitled cause.

I.

The trial court erred in that it misapplied the rule requiring a selective service registrant to exhaust his administrative remedies before he can present his defenses to a court.

II.

The trial court erred in not holding that the denial of the conscientious objector status by the Selective Service System and the recommendation by the Hearing Officer to the Department of Justice and by the Department of Justice to the Board of Appeals were each without basis in fact, arbitrary, capricious and contrary to law.

III.

The trial court erred in not holding that the report of the Hearing Officer, relied upon by the Department of Justice and the Board of Appeals, is arbitrary, capricious and illegal because it refers to artificial, fictitious and unlawful standards not authorized by the Act and Regulations and advises the Board of Appeals to classify according to irrelevant and immaterial lines in determining that the defendant was not a conscientious objector when a pursuit of the Act and Regulations was the **only** thing for the Hearing Officer and the Board of Appeals to follow.

/s/ J. B. TIETZ.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 15, 1956.

No. 15385.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

DICK LEE EVANS,

Appellant.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
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FILED

APR 29 1957

PAUL P. O'BRIEN, CLERK

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

DICK LEE EVANS,

Appellant.

APPELLEE'S BRIEF.

I.

Statement of Jurisdiction.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on April 25, 1956 under Section 462 of Title 50 Appendix, United States Code, for refusing to submit to induction into the Armed Forces of the United States [Tr. 3-4]. On May 14, 1956 appellant appeared before the Honorable William C. Mathes, United States District Judge for arraignment. He entered a plea of not guilty on May 28, 1956. Trial was commenced on July 23, 1956 before the Honorable Thurmond Clarke in the United States District Court for the Southern District of California. On July 30, 1956 appellant was found guilty as charged in the Indictment. Appellant was sentenced on August 6, 1956 to the custody of the Attorney General for im-

prisonment for a period of three months. The District Court had jurisdiction of the cause of action under Section 462 of Title 50 Appendix, United States Code and Section 3231, Title 18, United States Code. This Court has jurisdiction under Section 1291 of Title 28, United States Code.

II.

Statute Involved.

The Indictment in this case was brought under Section 462 of Title 50, Appendix, United States Code. The Indictment charges a violation of Section 462 of Title 50, Appendix, United States Code, which provides in pertinent part:

“(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this Title (Sections 451-470 of this Appendix), or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this Title (said Sections), or rules, regulations, or directions made pursuant to this Title (said Sections) . . . shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment”

III.

Statement of the Case.

The Indictment returned on April 25, 1956 charges that the appellant was duly registered with Local Board No. 115. He was thereafter classified 1-A and notified to report for induction into the Armed Forces of the United States on December 6, 1955 in Los Angeles County, California. The Indictment charges that the defendant at that time and place did knowingly fail and refuse to be inducted into the Armed Forces of the United States [Tr. 3 and 4]. On May 14, 1956 appellant was arraigned before the Honorable William C. Mathes, United States District Judge. On May 28, 1956 appellant entered a plea of not guilty before Judge Mathes and the case was set for trial. Trial was commenced on July 23, 1956 before the Honorable Thurmond Clarke without a jury. Pursuant to stipulation a photostatic copy of appellant's Selective Service was placed into evidence. On July 30, 1956 appellant was found guilty as charged in the Indictment. On August 6, 1956 appellant was sentenced to the custody of the Attorney General for imprisonment for a period of three months.

Appellant relies upon the following points in the prosecution of his appeal:

1. The trial court erred in that it misapplied the rule requiring a Selective Service registrant to exhaust his administrative remedies before he can present his defenses to a court.

2. The trial court erred in not holding that the denial of the conscientious objector status by the Selective Service system and a recommendation by the hearing officer to the Department of Justice and by the Department of Justice to the Board of Appeal for each without basis in fact, arbitrary, capricious and contrary to law.
3. The trial court erred in not holding that the report of the hearing officer, relied upon by the Department of Justice and the Board of Appeal, is arbitrary, capricious and illegal because it refers to artificial, fictitious and unlawful standards not authorized by the Act and regulations and advises the Board of Appeal to classify according to irrelevant and immaterial lines in determining that the defendant was not a conscientious objector when a pursuit of the Act and regulations was the only thing for the hearing officer and the Board of Appeal to follow. [Tr. 23, 24.]

IV.

Statement of the Facts.

Appellant registered under the Selective Service Act on June 27, 1951 at Local Board No. 115, Downey, California. Appellant completed and filed his Selective Service and Classification Questionnaire on November 26, 1951 [Ex. 4]. He indicated therein that he was conscientiously opposed to participation in war in any form and requested the Special Form for Conscientious Objector [Ex. 10]. The Special Form for Conscientious Objector was filed by appellant at Local Board No. 115 on December 19, 1951. Appellant there stated that he

was a member of Jehovah's Witnesses and that he had been a member of this sect since he was seven years old [Ex. 16]. On February 13, 1952 appellant was classified 1-A and was so advised by the mailing of Form 110 on February 26, 1952 [Ex. 11]. A letter appealing the classification was received from appellant by Local Board 115 on March 12, 1952 [Ex. 20]. The file was forwarded to the Appeal Board on January 23, 1953 [Ex. 11]. Appellant was retained in class 1-A by the Appeal Board on August 5, 1954 [Ex. 23]. Prior to this classification appellant's file had been forwarded by the Appeal Board to the Department of Justice for hearing and recommendation. The recommendation from the Department of Justice was received by the Appeal Board for the Southern District of California on August 2, 1954 [Ex. 29]. It was there recommended that appellant's conscientious objector claim be not sustained. Enclosed with the Department of Justice recommendation was a résumé of the investigative report [Ex. 31], which indicated generally that friends and acquaintances of appellant were not aware of the fact that appellant claimed to be a conscientious objector as he had never manifested any particularly religious inclinations. On September 14, 1954 appellant submitted additional information to Local Board 115 concerning his conscientious objector claim [Ex. 40]. Appellant there stated that he was a member of the Jehovah's Witnesses but that he "couldn't claim to be a regular member." This additional information had been requested by the Local Board on September 1,

1954 [Ex. 44]. On May 10, 1955 appellant's classification was reopened by Local Board No. 115 pursuant to* directive from the Director of Selective Service. He was on that date retained in Class 1-A and notified of said classification [Ex. 11]. By a letter dated June 1, 1955 the Local Board requested appellant to appear for an interview with the Local Board for the purpose of clarifying information in his Selective Service file [Ex. 46]. On June 14, 1955 appellant appeared before the Local Board for a personal interview. Appellant there stated that he had been a member of Jehovah's Witnesses for about eight years but that he did not attend church regularly or participate in church activities [Ex. 54]. Appellant also submitted additional written information in which he made the statement upon which appellant relies so strongly "but that doesn't change the way I believe" [Ex. 48]. After the personal interview on June 14, 1955 appellant was retained in Class 1-A by the Local Board. No appeal was taken from this classification nor had any appeal been taken by appellant since March 12, 1952 which appeal led to his classification on August 5, 1954 by the Appeal Board [Ex. 11]. On November 23, 1955 an order to report for induction on December 6, 1955 was sent to appellant [Ex. 52]. Appellant appeared at the induction station as ordered but refused to be inducted into the armed forces [Ex. 103].

*Pursuant to directive from the Director of Selective Service.

V.
ARGUMENT.

1. Appellant Is Not Entitled to Judicial Review.

A. The Law Requires Exhaustion of Administrative Remedies.

It is settled that a registrant is not entitled to a judicial review of any classification from which he did not appeal. The authorities are all to the effect that the judicial machinery may not be invoked until all administrative remedies have been unsuccessfully pursued.

Falbo v. United States, 320 U. S. 549;

Billings v. Truesdell, 321 U. S. 542;

Olinger v. Partridge (C. A., 9), 196 F. 2d 986;

Williams v. United States (C. A., 9), 203 F. 2d 85;

Rowland v. United States (C. A., 9), 207 F. 2d 621;

Kaline v. United States (C. A., 9), 235 F. 2d 54.

Appellant attempts to distinguish himself from the operation of the rule, as stated in the above cases. These asserted distinctions will be discussed below.

This Court, in a rather recent decision, had occasion to discuss the exhaustion rule thoroughly. *Mason v. United States*, 218 F. 2d 375 (1954). It was there asserted, as it is here, that the *Falbo* rule was inapplicable because *Mason* had due process of defenses and that, since such defenses raised jurisdictional questions, the rule of *Falbo* should not cut them off because of failure to ex-

haust administrative remedies. This Court rejected that argument on the basis of *United States v. Balogh*, 329 U. S. 692, and 160 F. 2d 999 (C. A., 2). In the *Balogh* case the Court of Appeals for the 2nd Circuit had reversed a conviction of the defendant for failing to report for induction into the army. The Court felt that the manner in which his ministerial claim had been handled denied Balogh a fair hearing. The Supreme Court vacated the judgment of the Circuit Court, and remanded the cause to the Circuit Court, citing the *Falbo* case. The Circuit Court, then, in the case of the *United States v. Balogh*, 160 F. 2d 999, affirmed the conviction of the District Court. The Court said, at page 1001,

“ . . . We hold that Balogh had not ‘exhausted his administrative remedies’ within the meaning of *Falbo v. United States*, (supra), and it follows that he was not entitled to raise those objections to his induction which we considered and decided in his favor upon the first appeal.”

The net result of the *Mason* and *Balogh* cases is that the Supreme Court, the Ninth Circuit, and the Second Circuit have directed that even where a registrant can show unfairness in the manner in which he was classified by his Local Board, he has no standing in Court to assert those defenses where he has failed to take an appeal within the Selective Service System. Appellant here begs the question in arguing that he was not required to take an appeal because he had been denied due process in the classification procedure. The above cited cases make it clear that such defenses cannot be presented until after exhaustion of administrative remedies by appropriate appeal.

B. Clark v. United States, 236 F. 2d 13 (C. A. 9), Does Not Obviate the Necessity of Taking a Second Appeal.

Nothing said by this Court in the *Clark* case forbids the taking of a second appeal. Appellant relies upon the following language at page 21 of the *Clark* case:

“A registrant is not entitled to repetitious determinations of identical issues.”

Appellee submits this language cannot be construed to limit the burden placed upon appellant to appeal his classification. In the *Clark* case this Court was dealing with a registrant who could not bring himself within the statutory definition of “conscientious objector.” This Court, using the above-quoted language, held simply that Clark was not entitled to a second hearing where he had already had one hearing on a prior appeal and had stated to the Local Board that he had had no change in his way of thinking since the first hearing. Nothing was said by the Court which can be construed to limit the right of a registrant to appeal from his Local Board’s classification. The *Clark* case must be considered in the light of whether or not Clark was prejudiced by the denial of the second hearing before a Department of Justice Hearing Officer. In the event Clark could have shown prejudice by a failure to grant him a second hearing, the Court very probably would have required a second hearing. This Court has made it clear, however, that the mere failure to comply with statutory directive is not, *per se*, a violation of due process. *Uffelman v. United States* (C. A. 9), 230 F. 2d 297, and *Kaline (supra)*. Appellant certainly can show no prejudice by the reopening of his classification. Such reopening started the whole appeal procedure running again, notwithstanding the *Clark* case which deals only with hearings and not with

appeals. Certainly if appellant had taken an appeal and the local board had refused to send his file on to the appeal board, he could legitimately argue that he had been denied rights set forth in the statute. How then can appellant argue that he was prejudiced by a reopening of his classification with the consequential right of appeal where the denial of the right of appeal clearly would be prejudicial? For these reasons, appellee respectfully submits that the *Clark* case cannot be relied upon by appellant for the proposition that he was not permitted a second appeal.

C. There Was a Change in Status Requiring Appellant to Take an Appeal.

Appellant argues that the appeal taken by him on March 12, 1952, [Ex. p. 20], obviates the necessity of Appellant's taking a subsequent appeal. Appellant was placed in Class 1-A by the Appeal Court for the Southern Federal Judicial District of the State of California, Panel No. 2, on August 5, 1954, [Ex. p. 23]. Prior to this classification, his case had been referred to the Department of Justice for an advisory recommendation pursuant to 50 Appendix, United States Code, Section 456(j), and 32 C. F. R. 1626.25. On March 14, 1955 the Supreme Court held, in *Gonzales v. United States*, 348 U. S. 407, that a registrant was denied a fair hearing where he did not receive a copy of the Department of Justice recommendation to the Appeal Court prior to the classification by the Appeal Board. Accordingly, on April 1, 1955, pursuant to 32 C. F. R. 1625.3(a), the Director of Selective Service promulgated a directive which provides, in pertinent part, as follows:

“Under the provisions of Section 1625.3(a) of the Selective Service Regulations, Local Boards are requested to reopen and consider anew the classifica-

tion (1) of every registrant presently in Class I-A whose case involves a claim of conscientious objection which has been finally denied by the Appeal Board or the President, . . .”

Inasmuch as Appellant's case had not been processed in the manner required by the *Gonzales* case, his classification was re-opened and on May 10, 1955 he was classified I-A [Ex. p. 11]. Appellee concedes that had Appellant been ordered for induction on the basis of the Appeal Board classification of August 5, 1954, there would have been a denial of a fair hearing as prescribed by the *Gonzales* case. Under these circumstances, the Local Board had no alternative but to re-open the classification of Appellant, and allow him an opportunity to take another appeal. If the argument of Appellant is accepted, that the Local Board could not re-classify appellant in the same class, then appellant would have been totally immune from ever being ordered to report for induction. Such a construction of the law would mean that once an error had been made in classification procedure the local board would have no power to correct the error even though the error was made prior to the sending of the order to report for induction and precluded the local board's power to validly order a registrant for induction. It will be noted, however, that the classification out of which the prosecution arose was a classification of June 14, 1955. Prior to this classification, registrant had a personal hearing before the local board and submitted additional written evidence of his claim. [Ex. pp. 48-51, 54.] It will be noted that this additional information was supplied to the local board well after the time the appeal board classified appellant 1-A on August 5, 1954. Hence, there was some new and intervening evidence on which the board could act.

**D. The Law Does Not Support Appellant's Argument
That an Appeal Was Not Required.**

It has already been pointed out above that the case of *Clark v. United States, supra*, does not excuse appellant's failure to appeal his classification. Appellant argues, however, that there are recognized exceptions in the field of administrative law to the doctrine of exhaustion of administrative remedies. Appellant has cited no authority for this proposition in the field of Selective Service law. There is no authority calling for a departure from the "long settled rule of judicial administration that no one is entitled to judicial relief for his supposed or threatened injury until a prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41. The only departure from the rule in the *Myers* case are in cases like *Levers v. Anderson*, 326 U. S. 219, where the Court held that the petitioner does not have to file a petition for a rehearing where one hearing had already been granted and the granting of the rehearing was purely discretionary with the agency. In the case of *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, it was held that an order by the Interstate Commerce Commission clearly exceeded its statutory powers. Hence, the Court would maintain jurisdiction notwithstanding the fact that no attempt was made to obtain redress from the Interstate Commerce Commission itself. Cases of this kind cited by appellant are clearly distinguishable for there is no question here that the board had jurisdiction to classify and order appellant for induction. It is clear in the statute, 50 App. U. S. C. 450 *et seq.*, and in the regulations, 32 C. F. R. 1622.1(c), that it is the local board's responsibility to decide, subject to the right of appeal,

the class in which each registrant shall be placed and to order him for induction. Hence, the claim made here that the local board exceeded its jurisdiction in ordering appellant for induction and that this fact relieves appellant of the duty of appealing his classification has no basis in fact or in law.

2. There Was Basis in Fact for Appellant's Classification and the Standards Used by the Local Board in Classifying Appellant Were Authorized by Law.

Appellant's second and third points will be discussed together herein for they necessarily overlap. Appellant concedes that his "threshold point" is controlling here and in the event the Court rules against him on that point the Court cannot look further to determine if there was basis in fact for appellant's classification. 32 C. F. R. 1622.1(c) states as follows:

"It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it. The mailing by the local board of the classification questionnaire (SSS Form No. 100) to the latest address furnished by a registrant shall be notice to the registrant that unless information is presented to the local board, within a time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class 1-A."

It is apparent from the foregoing regulation that the burden was on appellant to establish his exemption from military service. *Gaston v. United States* (C. A. 4, 1955), 222 F. 2d 818. The case of *Witmer v. United States*, 348 U. S. 375 is controlling as to whether or not appellant satisfied this burden and as to whether or not there was basis in fact for the classification arrived at by the local board. In that case the Supreme Court affirmed the conviction of a registrant who had failed to submit to induction after his claim as a conscientious objector had been denied by the local board. The Court said at page 381:

“Petitioner argues from this that there was no specific evidence herein compatible with his claimed conscientious objector status. But in *Dickinson* (346 U. S. 389) the registrant made out his prima facie case by means of objective facts—he was ‘a regular or duly ordained minister in religion.’ Here the registrant cannot make out a prima facie case from objective facts alone, because the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form. In these cases, objective facts are relevant insofar as they help in determining the sincerity of the registrant in his claimed belief, purely a subjective question. In conscientious objector cases, therefore, any fact which cast doubt on the veracity of the registrant is relevant . . . in short, the nature of a registrant’s prima facie case determines the type of evidence needed to rebut his claim.”

It is clear from this language that in order to determine the subjective state of mind of a registrant, the

local board must look to his objective acts. Appellant filed his special form for conscientious objector on December 19, 1951, with the local board. [Ex. 13.] In it, he stated he had been affiliated with Jehovah's Witnesses as a minister ever since he was seven years old. [Ex. 16.] On June 14, 1955, in a written form submitted to the local board he stated that he was not a member of a church, religious organization or sect. [Ex. 48.] He also stated, "I haven't been active in the preaching work or attending the bible studies regular, but that doesn't change the way I believe." It was further stated [Ex. 49], ". . . every chance I have I tell whoever I am talking to on the subject of the bible what I believe is the correct meaning and if I had a bible we look through it and see if I can clear up what we are discussing." These statements of appellants must be compared with the statements made by acquaintances which are contained in the investigative résumé. [Exs. 31-33.] It is readily apparent from the investigative résumé that appellant had manifested his conscientious scruples to no one. All fellow employees interviewed stated that they had no idea that appellant claimed to be a conscientious objector and that he had never indicated to any of them that he had any objection to military service.

It will also be noted that the members of the local board had an opportunity to evaluate the sincerity of appellant at his personal appearance before the local board on June 14, 1955. [Ex. 54.] Appellant there reiterated his claim as a conscientious objector; however, he again could indicate no objective acts on his part which would show his subjective state of mind in claiming to be a conscientious objector. Appellant indicated there among

other things that he was a plumber and a truck driver, that he had taken part in all school sports, that he owned a rifle and did some deer hunting. Appellee concedes that these statements of appellant's activities taken individually are of little significance. However, when weighed with the material contained in the investigative résumé [Ex. 31] and with the impression the appellant made on the hearing officer [Ex. 30], appellee respectfully submits that there were more than sufficient objective acts, or lack of them, that provide "basis in fact" for the classification of 1-A arrived at by the local board.

Appellee does not intend to discuss at length the scope of review of Selective Service Orders in the Courts. It has long been settled "that the Courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. Decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." *Estep v. United States*, 327 U. S. 114.

Appellee respectfully submits that the evidence presented to the Trial Court clearly indicated that there was basis in fact for the local board's classification. Hence, the District Court was not called upon to look further into the classification of appellant. Appellee further submits that the standards used by the local board in determining appellant's classification were relevant and material as prescribed by the *Witmer* case, *supra*.

Conclusion.

1. The District Court did not err in denying appellant's motion for judgment of acquittal.

2. The District Court did not err in finding the defendant guilty; the evidence supports the judgment, and appellant's conviction should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney,

LOUIS LEE ABBOTT,

Assistant U. S. Attorney,

Chief, Criminal Division,

LLOYD F. DUNN,

Assistant U. S. Attorney,

Attorneys for Appellee United States of America.

No. 15385

No. 15396

**United States
Court of Appeals**
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

HALTON TRACTOR COMPANY, INC., a Corporation and WES DURSTON, INC., a Corporation,
Appellees.

Transcript of Record

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

FEB 15 1957

PAUL P. O'BRIEN, CLERK



No. 15396

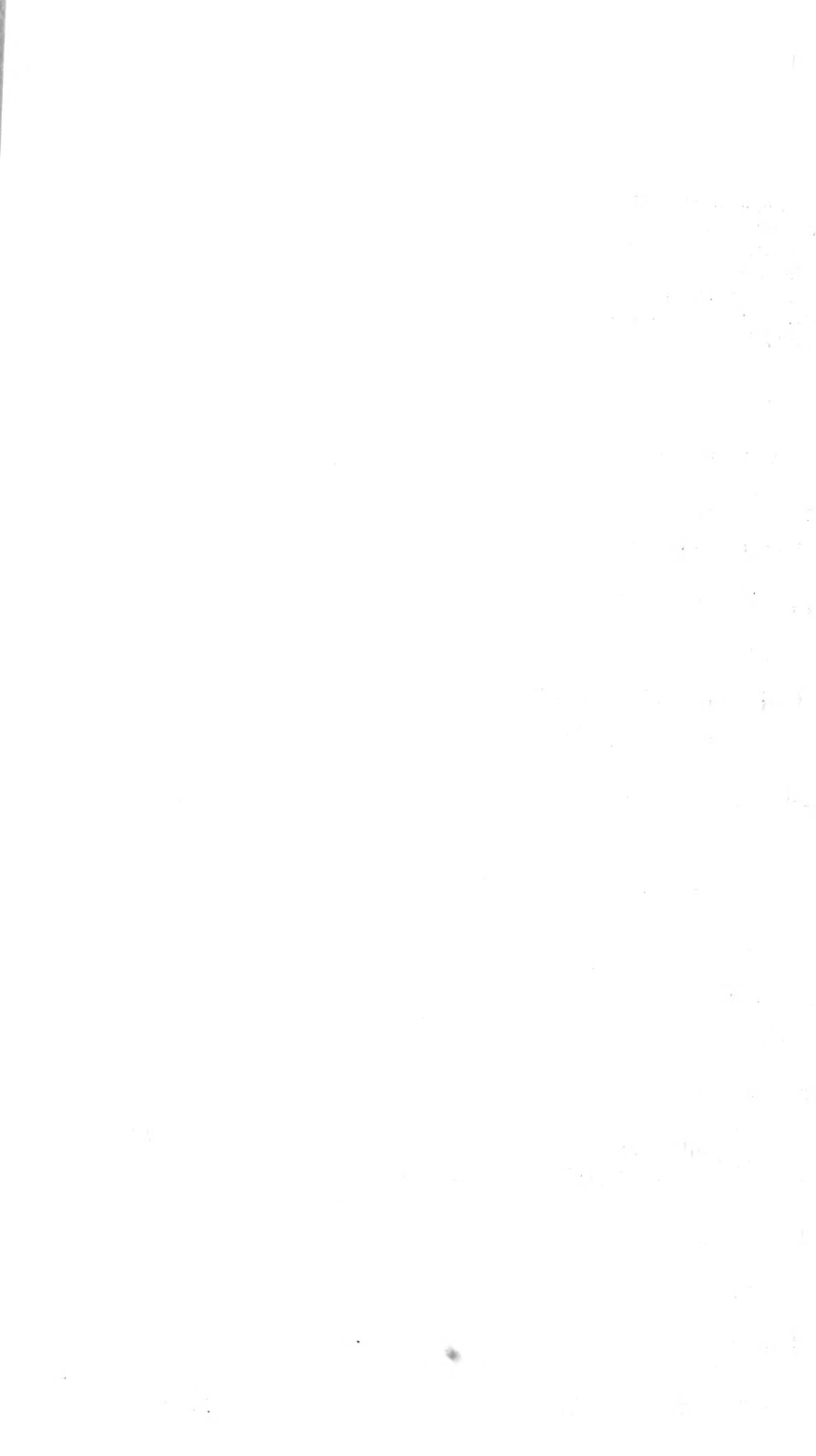
United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

HALTON TRACTOR COMPANY, INC., a Corporation and WES DURSTON, INC., a Corporation,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

CHARLES K. RICE,
Assistant U. S. Attorney General,
Department of Justice,
Washington 25, D. C.;

LLOYD H. BURKE,
United States Attorney;
MARVIN D. MORGENSTEIN,
Assistant United States Attorney,
For Appellant.

HENRY M. JONAS,
40 Post Street;

ROY A. SHARFF,
625 Market Street,
San Francisco,
For Appellees.

United States District Court for the Northern
District of California

Civil Action File No. 32,133

HALTON TRACTOR COMPANY, INC., a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

The above-named plaintiff for its complaint alleges as its cause of action as follows:

1. That plaintiff, Halton Tractor Company, Inc., is a corporation, duly organized and existing under the laws of the State of California, maintaining its principal office at Merced, California.

2. That James G. Smyth, the former Collector of Internal Revenue for the United States of America for the district of Northern California, is no longer in office, and that therefore, suit may be brought against the United States of America, pursuant to Section 1346 of Title 28, United States Code.

3. That on or about March 15, 1950, plaintiff filed in the Office of the Collector of Internal Revenue at San Francisco, California, its claim for refund, a copy of which is attached hereto, marked "Exhibit A," and incorporated by reference.

4. That this action arises under the laws of the United States for Internal Revenue, and particularly, under Section 3772 of Title 26 of the United States Code.

5. That the claim as filed with the Collector of Internal Revenue was rejected by the Commissioner of Internal Revenue in Washington, D. C., under date of December 15th, 1950, and plaintiff was so notified by registered mail.

6. That plaintiff maintains that the payment of \$5,877.97 paid to the Collector of Internal Revenue was made involuntarily, under duress, and under protest, and that the United States Government is unjustly enriched for said amount, and in the opinion of plaintiff, is bound to repay said sum to plaintiff with the interest as provided for in the Internal Revenue Code.

7. That Francis J. Reilly, deputy collector, approached plaintiff and submitted a document entitled "Lloyd Watson Analysis of Taxes," the original of which showing the handwriting of said Francis J. Reilly, a copy of which is attached hereto, marked "Exhibit B," and incorporated by reference; that said Francis J. Reilly stated to plaintiff and its officers that the only recourse in this matter would be to pay the Internal Revenue Department the sum indicated in this complaint, and then to file a claim for refund for paying the taxes of someone else, to wit, Lloyd Watson.

8. That said Francis J. Reilly entered upon the business premises of plaintiff without plaintiff's

invitation or approval, pasting a piece of Scotch tape on each of the pieces of equipment, stating "Property of the United States Government" (Notice of Seizure).

9. That plaintiff has repossessed said equipment from Lloyd Watson under its conditional sales contract, said Lloyd Watson having defaulted on his payments under said contract and thereby forfeited any rights, if any he had to such property; and that at the time said Francis J. Reilly demanded and exacted payment from plaintiff, said equipment was no longer in the possession and/or control of said Lloyd Watson; that at no time and under no consideration or theory was plaintiff obligated to pay Social Security taxes for Lloyd Watson's employees nor Lloyd Watson personally.

10. That defendant, United States of America, in the proceedings before the Commissioner of Internal Revenue, conceded that the equipment seized and sought to be distrained by said Francis J. Reilly, was not owned by said Lloyd Watson, its taxpayer, but maintained that defendant, United States of America, was permitted to reach any "equity" of said Lloyd Watson in the hands of a third party, to wit, the plaintiff herein.

11. That plaintiff, while maintaining that at the time the equipment was seized by said Francis J. Reilly, no equity in favor of Lloyd Watson existed, contends that Section 3710 of the Internal Revenue Code protects third parties if "any rights of prop-

erty subject to distraint” are sought to be reached by governmental process; that the rights of the Internal Revenue Collector rise no higher than those of the taxpayer whose “right to property” is sought to be levied.

12. That Section 3710 of Title 28, United States Code, as a prerequisite of a lawful seizure of any rights of property of Lloyd Watson, if any existed, in the hands of a third party, lays down as an immutable rule that:

(a) a notice of lien (Form 668, Internal Revenue Service) and

(b) a warrant for distraint (Form 69, Internal Revenue Service)

be served at the same time of the levy on the third party, to wit, the plaintiff herein.

13. That plaintiff contends that no such procedure was followed by said Francis J. Reilly, who solely handed to said plaintiff the document marked as “Exhibit B,” a copy of which is attached hereto; that said Francis J. Reilly’s failure to comply with the provisions of the Internal Revenue Laws and the interpretation given said Section 3710 by the United States courts, made an unlawful seizure, entitling the aggrieved party to at least recover any and all amounts paid under duress of such wrongful act, plus 6% interest per annum, as provided by law, from date of payment.

14. That said Francis J. Reilly, acting as deputy collector for defendant, United States of America,

in making such unlawful seizure, was a trespasser ab initio, and the defendant, United States of America, for which he acted in his official capacity, should not benefit from such unlawful and wrongful act by refusing to refund any moneys paid by an innocent third party, the plaintiff herein.

15. That Section 3772 of Title 28 of the United States Code provides that no protest need have been made nor any duress shown to maintain an action on any amounts, which were "in any manner wrongfully collected"; that nevertheless plaintiff is willing and able to show that a verbal protest was made to said Francis J. Reilly, when he exacted the sum for which suit for refund is filed in this proceeding.

Wherefore, plaintiff demands judgment against the defendants in the sum of \$5,877.97 plus 6% interest per annum from the sum of \$2,000.00 since February 20th, 1948, and for the additional sum of \$3,877.97 from March 15, 1948, together with costs and disbursements of this action.

/s/ HENRY M. JONAS,
Attorney for Plaintiff.

Dated: December 2nd, 1952.

EXHIBIT "A"

Form 843

Treasury Department

Internal Revenue Service

(Revised July, 1947)

Claim

To Be Filed With the Collector Where
Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

Refund of Taxes Illegally, Erroneously, or
Excessively Collected

Collector's Stamp: Received Mar. 15, 1950. Collector of Int. Rev., First Dist., Calif.

State of California,
City and County of San Francisco—ss.

Name of taxpayer or purchaser of stamps: Halton
Tractor Company, a California Corporation.

Business address: Merced, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

* * *

3. Character of assessment or taxes: Taxes erroneously and illegally collected from Halton Tractor Co.

4. Amount of assessment: \$5,877.97; dates of payment, February 21, 1948, and March 15, 1948.

* * *

6. Amount to be refunded, \$5,877.97, plus interest as provided for by Internal Revenue Code.

* * *

8. The time within which this claim may be legally filed expires, under Section 3313 of Internal Revenue Code, on February 20, 1952, and March 15, 1952, respectively.

The deponent verily believes that this claim should be allowed for the following reasons:

Certain tractors and equipment belonging to Halton Tractor Company, Merced, California, were levied upon by the United States Treasury Department in 1948 for Social Security and Withholding taxes due to the United States Government from a certain Mr. Lloyd Watson, contractor, Los Banos, California. In order to prevent distraint of the property owned by the Halton Tractor Company, the sum of \$5,877.97 was paid to the Collector of Internal Revenue, San Francisco, California, in two checks on February 20, 1948, and March 15, 1948.

Payment of the amount of \$5,877.97 was made in order to prevent the sale of the equipment, although

Halton Tractor Company, a California corporation, was never itself liable for those taxes, inasmuch as Lloyd Watson, a customer of theirs, should have paid those tax obligations.

Under the decisions of *Thomas A. Smart vs. U. S.*, 21 F. (2d) 188, and *Grace Parsons v. Anglim*, 143 F. (2d) 534, any taxes paid on behalf of another party which were paid involuntarily must be refunded by the U. S. Government, and this deponent verily believes that the claim for refund is absolutely justified.

/s/ EDWARD H. HALTON,
President, Halton Tractor
Company.

Subscribed and sworn to before me this 3rd day of March, 1950.

HENRY M. JONAS,
Notary Public.

Halton Tractor Co., Inc.

11

EXHIBIT "B"

Lloyd Watson Analysis of Taxes

Kind of Tax	Amt.	Pen.	Int.	Lien	Total
S.S. 4th Qtr., 1946.....	199.96	9.95	8.29		217.19
Applied Balance for S.S. 4th Qtr., 1946....	32.81	1.64	1.35		35.80
W.T. 3/31/47 (Originally \$4,722.51 —reduced by \$2,200.)	2,210.36	210.02	101.13	1.00	2,522.51
S.S. 3/31/47	719.59	35.98	23.71		779.28
S.S. 6/30/47	277.68	69.42	10.41		357.51
W.T. 6/30/47	1482.20	370.55	55.58		1,908.33
S.S. 9/30/47	45.98	11.50	1.26		58.74
W.T. 9/30/47	248.40	62.10	6.83		317.33
Excise Tax, 1946	122.45	30.61	77.96		161.02
Excise Tax, 1947	1,545.29	77.26	7.73		1,630.28
					7,987.99
					2,200.00
					<hr/>
					10,187.99
					2,200.00
					<hr/>
					9,987.99
					<hr/>
					7,987.99
Error					200.00
					<hr/>
					7,787.99
					<hr/>

[Endorsed]: Filed December 31, 1952.

United States District Court for the Northern
District of California

Civil Action File No. 32,134

WES DURSTON, INC., a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

The above-named plaintiff for its complaint alleges as its cause of action as follows:

1. That plaintiff, Wes Durston, Inc., is a corporation, duly organized and existing under the laws of the State of California, maintaining its principal office at Los Angeles, California.

2. That James G. Smyth, the former Collector of Internal Revenue for the United States of America for the District of California, is no longer in office, and that therefore, suit may be brought against the United States of America, pursuant to Section 1346 of Title 28 of the United States Code.

3. That on or about February 23rd, 1950, plaintiff filed in the Office of the Collector of Internal Revenue at San Francisco, California, its claim for refund, a copy of which is attached hereto, marked "Exhibit A," and incorporated by reference.

4. That this action arises under the laws of the United States for Internal Revenue, and particularly, under Section 3772 of Title 26 of the United States Code.

5. That the claim as filed with the Collector of Internal Revenue was rejected by the Commissioner of Internal Revenue in Washington, D. C., under date of December 15th, 1950, and plaintiff was so notified by registered mail.

6. That plaintiff maintains that the payment of \$3,900.00 paid to the Collector of Internal Revenue was made involuntarily, under duress, and under protest, and that the United States Government is unjustly enriched for said amount, and in the opinion of plaintiff, is bound to repay said sum to plaintiff with the interest as provided for in the Internal Revenue Code.

7. That Francis J. Reilly, deputy collector, approached plaintiff's agent, Halton Tractor Company, Inc., at Merced, California, submitting to them a document entitled, "Lloyd Watson Analysis of Taxes," the original of which showing the handwriting of said Francis J. Reilly, a copy of which is attached hereto, marked "Exhibit B," and incorporated by reference; that said Francis J. Reilly stated to plaintiff's agent and its officers that the only recourse in this matter would be to pay the Internal Revenue Department the sum indicated in this complaint, and then to file a claim for refund for paying the taxes of someone else, to wit: Lloyd Watson.

United States District Court for the Northern
District of California

Civil Action File No. 32,134

WES DURSTON, INC., a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

The above-named plaintiff for its complaint alleges as its cause of action as follows:

1. That plaintiff, Wes Durston, Inc., is a corporation, duly organized and existing under the laws of the State of California, maintaining its principal office at Los Angeles, California.

2. That James G. Smyth, the former Collector of Internal Revenue for the United States of America for the District of California, is no longer in office, and that therefore, suit may be brought against the United States of America, pursuant to Section 1346 of Title 28 of the United States Code.

3. That on or about February 23rd, 1950, plaintiff filed in the Office of the Collector of Internal Revenue at San Francisco, California, its claim for refund, a copy of which is attached hereto, marked "Exhibit A," and incorporated by reference.

4. That this action arises under the laws of the United States for Internal Revenue, and particularly, under Section 3772 of Title 26 of the United States Code.

5. That the claim as filed with the Collector of Internal Revenue was rejected by the Commissioner of Internal Revenue in Washington, D. C., under date of December 15th, 1950, and plaintiff was so notified by registered mail.

6. That plaintiff maintains that the payment of \$3,900.00 paid to the Collector of Internal Revenue was made involuntarily, under duress, and under protest, and that the United States Government is unjustly enriched for said amount, and in the opinion of plaintiff, is bound to repay said sum to plaintiff with the interest as provided for in the Internal Revenue Code.

7. That Francis J. Reilly, deputy collector, approached plaintiff's agent, Halton Tractor Company, Inc., at Merced, California, submitting to them a document entitled, "Lloyd Watson Analysis of Taxes," the original of which showing the handwriting of said Francis J. Reilly, a copy of which is attached hereto, marked "Exhibit B," and incorporated by reference; that said Francis J. Reilly stated to plaintiff's agent and its officers that the only recourse in this matter would be to pay the Internal Revenue Department the sum indicated in this complaint, and then to file a claim for refund for paying the taxes of someone else, to wit: Lloyd Watson.

8. That said Francis J. Reilly entered upon the business premises of plaintiff's agent, Halton Tractor Company, Inc., at Merced, California, without invitation or approval, pasting a piece of Scotch tape on each of the pieces of equipment, stating, "Property of the United States Government" (Notice of Seizure).

9. That plaintiff had repossessed said equipment from Lloyd Watson under its conditional sales contract, said Lloyd Watson having defaulted on his payments under said contract and thereby forfeited any rights, if any he had to such property; and that at the time said Francis J. Reilly demanded and exacted payment from plaintiff and/or plaintiff's agent, respectively, said equipment was no longer in the possession and/or control of said Lloyd Watson; that at no time and under no consideration or theory was plaintiff obligated to pay Social Security Taxes for Lloyd Watson's employees, nor Lloyd Watson personally.

10. That defendant, United States of America, in the proceedings before the Commissioner of Internal Revenue, conceded that the equipment seized and sought to be distrained by said Francis J. Reilly, was not owned by said Lloyd Watson, its taxpayer, but maintained that defendant, United States of America, was permitted to reach any "equity" of said Lloyd Watson in the hands of a third party, to wit: The plaintiff herein.

11. That plaintiff, while maintaining that at the time the equipment was seized by said Francis J.

Reilly, no equity in favor of Lloyd Watson existed, contends that Section 3710 of the Internal Revenue Code protects third parties if "any rights of property subject to distraint" are sought to be reached by governmental process; that the rights of the Internal Revenue Collector rise no higher than those of the taxpayer whose "right to property" is sought to be levied.

12. That Section 3710 of Title 28, United States Code, as a prerequisite of a lawful seizure of any rights of property, if any existed, in the hands of a third party, lays down as an immutable rule that:

(a) a notice of lien (Form 668 Internal Revenue Service) and

(b) a warrant for distraint (Form 69 Internal Revenue Service)

be served at the same time of the levy on the third party, to wit: The plaintiff herein.

13. That plaintiff contends that no such procedure was followed by said Francis J. Reilly, who solely handed to said plaintiff's agent the document marked as "Exhibit B," a copy of which is attached hereto; that said Francis J. Reilly's failure to comply with the provisions of the Internal Revenue Laws and the interpretation given said Section 3710 by the United States Courts, made an unlawful seizure, entitling the aggrieved party to at least recover any and all amounts paid under duress of such wrongful act, plus 6% interest per annum, as provided by law, from date of payment.

14. That said Francis J. Reilly, acting as deputy collector for defendant, United States of America, in making such unlawful seizure, was a trespasser ab initio, and the defendant, United States of America, for which he acted in his official capacity, should not benefit from such unlawful and wrongful act by refusing to refund any moneys paid by an innocent third party, the plaintiff herein.

15. That Section 3772 of Title 28 of the United States Code provides that no protest need have been made nor any duress shown to maintain an action on any amounts, which were "in any manner wrongfully collected"; that nevertheless plaintiff is willing and able to show that a verbal protest was made to said Francis J. Reilly, when he exacted the sum for which suit for refund is filed in this proceeding.

Wherefore, plaintiff demands judgment against the defendants in the sum of \$3,900.00 plus 6% interest since March 15th, 1948, together with costs and disbursements of this action.

/s/ HENRY M. JONAS,
Attorney for Plaintiff.

Dated: December 2nd, 1952.

EXHIBIT "A"

Claim

Form 843

Treasury Department

Internal Revenue Service

(Revised July, 1947)

To Be Filed With the Collector Where
Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

Refund of Taxes Illegally, Erroneously, or
Excessively Collected

Collector's Stamp: [Blank.]

State of California,

City and County of San Francisco—ss.

Name of taxpayer or purchaser of stamps: Wes
Durstun, Inc.

Business address: 5547 Valley Boulevard, Los Angeles, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: San Francisco.

3. Character of assessment or tax erroneously and illegally collected from West Durston, Inc.

4. Amount of assessment, \$3,900.00; dates of payment, February 23, 1948.

* * *

6. Amount to be refunded, \$3,900.00 plus interest as provided for by Internal Revenue Code.

* * *

8. The time within which this claim may be legally filed expires, under Section 322 b of Internal Revenue Code on February 24th, 1950.

The deponent verily believes that this claim should be allowed for the following reasons:

Certain tractors and equipment belonging to Wes Durston, Inc., Los Angeles, was levied upon by the U. S. Treasury Dept. for Withholding taxes due the U. S. Government from Lloyd Watson, Los Banos, California. In order to prevent distraint an agent of Wes Durston, Inc., to wit: Halton Tractor Company, paid the sum of \$3,900.00 to the Collector of Internal Revenue, San Francisco, California, and informed Wes Durston, Inc., by letter, dated February 23, 1948, of such action.

Wes Durston, Inc., reimbursed their agents, Halton Tractor Company of Merced, Calif., by check No. 1908 on June 30, 1948.

This claim is filed by the authorized agent, Henry M. Jonas, Attorney at Law, 821 Market Street, San Francisco, California, admitted to practice before

the Treasury Dept. on November 18th, 1947, who will submit proper authority from Wes Durston, Inc., in due course. This claim is filed by him, in order to bring it within the two-year period, provided for by Section 322 b Internal Revenue Code. It will be supplemented and legal authorities shall be supplied later on.

/s/ HENRY M. JONAS,
Attorney at Law, 821 Market Street, San Francisco,
Calif., on Behalf of Wes Durston, Inc.

Subscribed and sworn to before me this 23rd day
of February, 1950.

/s/ RUTH W. GROSS,
Deputy Coll.

[The attached Exhibit B is identical to Exhibit B
attached to the Complaint, Cause No. 32133.]

[Endorsed]: Filed December 31, 1952.

[Title of District Court and Cause.]

Civil Action No. 32133

ANSWER

The defendant, by its attorney, Lloyd H. Burke, United States Attorney for the Northern District of California, for its answer to the complaint in the above-entitled action, denies all allegations of the complaint not hereafter expressly admitted or qualified. In further answer to the complaint, the defendant alleges as follows:

1. The defendant admits the allegations of paragraph 1 of the complaint.

2. The defendant admits the allegations of paragraph 2 of the complaint.

3. The defendant admits that on or about March 15, 1950, plaintiff filed a claim for refund in the Office of the Collector of Internal Revenue at San Francisco, California, and that Exhibit A attached to and made a part of the complaint is a true copy of that claim for refund, but denies any statement or allegation in said claim for refund not otherwise expressly admitted herein.

4. The defendant admits that this action arises under the laws of the United States for internal revenue, and particularly under Section 3772 of Title 26 of the United States Code.

5. The defendant admits the allegations of paragraph 5 of the complaint.

6. The defendant denies the allegations of paragraph 6 of the complaint.

7. The defendant denies the allegations of paragraph 7, except that it is admitted that Francis J. Reilly, deputy collector, gave to plaintiff a document entitled, "Lloyd Watson Analysis of Taxes," and that Exhibit B of the complaint represents a copy of said document.

8. The defendant denies the allegations of paragraph 8, except that it is admitted that said Francis J. Reilly pasted a piece of Scotch tape on each of

said pieces of equipment, stating, "Property of the United States Government."

9. The defendant denies the allegations of paragraph 9, except that it is admitted that plaintiff claimed some interest in the equipment under its conditional sales contract and that plaintiff claimed that Lloyd Watson had defaulted on his payments under said contract. It is alleged that on September 14, 1947, and prior to the time that plaintiff had regained possession of said equipment, tax liens were filed and made a matter of record at the Merced County Courthouse. It is further alleged that prior to the time that plaintiff regained possession of the equipment, plaintiff of its own volition and at its suggestion, contracted and agreed with said Francis J. Reilly to pay the tax due from Lloyd Watson in consideration for which said Francis J. Reilly agreed to refrain from seizing and selling said equipment. It is further admitted that at the time that plaintiff actually paid the taxes, said equipment was no longer in the possession of Lloyd Watson.

10. The defendant denies the allegations of paragraph 10, except that it is admitted that the United States of America in the proceedings before the Commissioner of Internal Revenue conceded that legal title to said equipment was not held by said Lloyd Watson, but maintained that the United States of America was entitled to reach any equitable interest in the equipment belonging to said Lloyd Watson.

11. The defendant denies the allegations of paragraph 11 of the complaint that no equity in favor of Lloyd Watson existed at the time the equipment was seized by said Francis J. Reilly. The defendant believes that the allegations of paragraph 11 of the complaint that Section 3710 of the Internal Revenue Code protects third parties if any rights of property subject to distraint are sought to be reached by governmental process and that the rights of the Internal Revenue Collector rise no higher than those of the taxpayer whose right to property is sought to be levied are allegations of law which the defendant is not required to answer and any attempt to admit or deny those allegations would be an invasion of the province of this Court.

12. The defendant believes that the allegations of paragraph 12 of the complaint are allegations of law which the defendant is not required to answer, and attempt to admit or deny those allegations would be an invasion of the province of this Court.

13. The defendant denies the allegations of paragraph 13 of the complaint, except that it is admitted that said Francis J. Reilly did not serve a notice of lien or a warrant of distraint upon plaintiff. It is further admitted that said Francis J. Reilly handed to plaintiff a document, a copy of which is made Exhibit B of the complaint.

14. The defendant denies the allegations of paragraph 14 of the complaint.

15. The defendant denies the allegations of para-

graph 15 of the complaint, except that it is admitted that Section 3772 of Title 26 of the United States Code provides that no protest need have been made nor any duress shown to maintain an action on any amounts which were in any manner wrongfully collected.

Wherefore, defendant prays for judgment dismissing the complaint with costs and disbursements.

/s/ LLOYD H. BURKE,
United States Attorney.

Certificate of Service attached.

[Endorsed]: Filed June 12, 1953.

[Title of District Court and Cause.]

Civil Action No. 32134

ANSWER

The defendant, by its attorney, Lloyd H. Burke, United States Attorney for the Northern District of California, for its answer to the complaint in the above-entitled action, denies each and every allegation of the complaint not hereinafter expressly admitted or qualified. In further answer to the complaint:

1. The defendant admits the allegations of paragraph 1 of the complaint.
2. The defendant admits the allegations of paragraph 2 of the complaint.

3. The defendant admits that on or about February 23, 1950, plaintiff filed a claim for refund in the Office of the Collector of Internal Revenue at San Francisco, California, and that "Exhibit A" attached to and made a part of the complaint is a true copy of that claim for refund, but denies any statement or allegation in said claim for refund not otherwise expressly admitted herein.

4. The defendant admits that this action arises under the laws of the United States for Internal Revenue, and particularly under Section 3772 of Title 26 of the United States Code.

5. The defendant admits the allegations of paragraph 5 of the complaint.

6. The defendant denies the allegations of paragraph 6 of the complaint.

7. The defendant is without knowledge or information as to whether Halton Tractor Company, Inc., is, or was, plaintiff's agent. The remaining allegations of paragraph 7 of the complaint are denied, except that it is admitted that Francis J. Reilly, Deputy Collector, gave to Halton Tractor Company, Inc., a document entitled, "Lloyd Watson Analysis of Taxes," and that "Exhibit B" of the complaint represents a copy of said document.

8. The defendant denies the allegations of paragraph 8 of the complaint, except that it is admitted that said Francis J. Reilly pasted a piece of Scotch tape on certain pieces of equipment, stating, "Property of the United States Government."

9. The defendant denies the allegations of paragraph 9 of the complaint, except that it is admitted that plaintiff claimed some interest in the equipment under its conditional sales contract and that plaintiff claimed that Lloyd Watson had defaulted on his payments under said contract. It is alleged that on September 14, 1947, and prior to the time that plaintiff had regained possession of said equipment, notices of tax liens were filed and made a matter of record in Merced County, California. It is further alleged that prior to the time that plaintiff regained possession of the equipment, plaintiff of its own volition and at its suggestion, contracted and agreed with said Francis J. Reilly to pay the tax due from Lloyd Watson in consideration for which said Francis J. Reilly agreed to refrain from seizing and selling said equipment. It is admitted that at the time that plaintiff actually paid the taxes, said equipment was no longer in the possession of Lloyd Watson.

10. The defendant denies the allegations of paragraph 10 of the complaint, except that it is admitted that in certain proceedings before Officers of the Internal Revenue Service it was conceded that legal title to said equipment was not held by said Lloyd Watson, but it was maintained that the United States was entitled to reach any equitable interest in the equipment belonging to said Lloyd Watson.

11. The defendant denies the allegations of paragraph 11 of the complaint that no equity in favor of Lloyd Watson existed at the time the equipment

was seized by said Francis J. Reilly. The defendant believes that the allegations of paragraph 11 of the complaint that Section 3710 of the Internal Revenue Code protects third parties if any rights of property subject to distraint are sought to be reached by governmental process and that the rights of the Internal Revenue Collector rise no higher than those of the taxpayer whose right to property is sought to be levied are allegations of law which the defendant is not required to answer and any attempt to admit or deny those allegations would be an invasion of the province of this Court.

12. The defendant believes that the allegations of paragraph 12 of the complaint are allegations of law which the defendant is not required to answer, and any attempt to admit or deny these allegations would be an invasion of the province of this court.

13. The defendant denies the allegations of paragraph 13 of the complaint, except that it is admitted that said Francis J. Reilly did not serve a notice of lien or a warrant of distraint upon plaintiff. It is further admitted that said Francis J. Reilly handed to Halton Tractor Company, Inc., a document, a copy of which is made "Exhibit B" of the complaint.

14. The defendant denies the allegations of paragraph 14 of the complaint, except that it is admitted that Section 3772 of Title 26 of the United States Code provides that no protest need have been made

nor any duress shown to maintain an action on any amounts which were in any manner wrongfully collected.

Wherefore, defendant prays for judgment dismissing the complaint with costs and disbursements.

/s/ LLOYD H. BURKE,
United States Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 8, 1954.

[Title of District Court and Cause.]

WRITTEN INTERROGATORIES PRO-
POUNDED TO PLAINTIFF BY DEFEND-
ANT

To: Plaintiff Halton Tractor Company, Inc., and
to Henry M. Jonas, Esq., its attorney:

Defendant United States of America propounds the following interrogatories to be answered by a duly authorized officer of plaintiff, under oath, within 15 days after the service hereof:

1. List each and every item of equipment, by serial number or other identification, which you claim was erroneously seized by Francis J. Reilly, Deputy Collector of Internal Revenue.

2. Do you base your claim of ownership of any of the chattels listed in response to interrogatory

1 upon a conditional sales contract? If so, attach a copy of that contract to your answer.

3. Do you base your claim of ownership to any of the chattels listed in response to interrogatory 1 upon a chattel mortgage? If so, attach a copy of the chattel mortgage to your answer.

4. If the answers to interrogatories 2 and 3 are "no," upon what is your claim of ownership based of the chattels listed in response to interrogatory 1? What price did you pay for the chattels?

5. At the time of the alleged unlawful seizure by Francis J. Reilly of the chattels listed in response to interrogatory 1, state:

(a) The total amount unpaid under your conditional sales contract, if any, relating to those chattels.

(b) The total amount unpaid under your chattel mortgage, if any, relating to those chattels.

6. As to each chattel listed in response to interrogatory 1, state the following:

(a) Whether or not you are still in possession of the chattel.

(b) Whether or not you have sold the chattel since the date of the alleged wrongful seizure of the chattel by Francis J. Reilly; and if such sale has been made, state the sales price, name and address of purchaser and date of sale.

Dated: January 20, 1955.

LLOYD H. BURKE,
United States Attorney;

By /s/ GEORGE A. BLACKSTONE,
Assistant United States Attorney, Attorneys for
Defendant.

Affidavit of Mail attached.

[Endorsed]: Filed January 20, 1955.

[Title of District Court and Cause.]

Civil No. 32134

WRITTEN INTERROGATORIES PRO-
POUNDED TO PLAINTIFF BY DEFEND-
ANT

To: Plaintiff Wes Durston, Inc., and to Henry M.
Jonas, Esq., its attorney:

Defendant United States of America propounds
the following interrogatories to be answered by a
duly authorized officer of plaintiff, under oath,
within 15 days after the service hereof:

1. List each and every item of equipment, by
serial number or other identification, which you
claim was erroneously seized by Francis J. Reilly,
Deputy Collector of Internal Revenue.

2. Do you base your claim of ownership of any
of the chattels listed in response to interrogatory 1

upon a conditional sales contract? If so, attach a copy of that contract to your answer.

3. Do you base your claim of ownership to any of the chattels listed in response to interrogatory 1 upon a chattel mortgage? If so, attach a copy of the chattel mortgage to your answer.

4. If the answers to interrogatories 2 and 3 are "no," upon what is your claim of ownership based of the chattels listed in response to interrogatory 1? What price did you pay for the chattels?

5. At the time of the alleged unlawful seizure by Francis J. Reilly of the chattels listed in response to interrogatory 1, state:

(a) The total amount unpaid under your conditional sales contract, if any, relating to those chattels.

(b) The total amount unpaid under your chattel mortgage, if any, relating to those chattels.

6. As to each chattel listed in response to interrogatory 1, state the following:

(a) Whether or not you are still in possession of the chattel.

(b) Whether or not you have sold the chattel since the date of the alleged wrongful seizure of the chattel by Francis J. Reilly; and if such sale has been made, state the sales price, name and address of purchaser and date of sale.

Dated: January 26, 1955.

LLOYD H. BURKE,
United States Attorney;

By /s/ GEORGE A. BLACKSTONE,
Assistant United States Attorney, Attorneys for
Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 26, 1955.

[Title of District Court and Cause.]

Civil No. 32133

ANSWER TO WRITTEN INTERROGATO-
RIES PROPOUNDED BY DEFENDANT

Comes now Edward H. Halton, President of Halton Tractor Company, Inc., a corporation, and answering the interrogatories propounded herein, sets forth as follows:

1. List each and every item of equipment, by serial number or other identification, which you claim was erroneously seized by Francis J. Reilly, Deputy Collector of Internal Revenue.

The foregoing question uses the word "seized." By answering this question, plaintiff does not admit that the same was legally or actually seized in the usual and common usage of the word or in accord-

ance with law. The fact is that Francis J. Reilly, as Deputy Collector of Internal Revenue, pasted a piece of paper upon the following pieces of equipment, upon each of which was written, "Property of United States Government":

6 DW10 Caterpillar tractors, bearing serial numbers IN-2581, IN-2582, IN-2167, IN-2172, IN-2791 and IN-2792, with 6 La Plante-Choate scrapers, numbers 566, 568, 145, 136, 430 and 425; that there was also in the possession of Halton Tractor Company 1 Chevrolet 6 5-passenger coupe, 1942 Fleetline, Engine No. BA 46673, Serial No. 6 BH 09-1801;

Ford V8 Pickup truck, Engine No. 699C-839050, Serial No. 699C-839050, in which Lloyd Watson had an interest; I informed said Francis J. Reilly of the fact that sales had been arranged for the said automobiles and Mr. Reilly refrained from attaching the same slips of paper upon them when I promised him that the proceeds from the sale of the same would be turned over to Mr. Reilly.

2. Do you base your claim of ownership of any of the chattels listed in response to interrogatory 1 upon a conditional sales contract? If so, attach a copy of that contract to your answer.

Yes. (See photostatic copy attached hereto.)

3. Do you base your claim of ownership to any of the chattels listed in response to interrogatory 1 upon a chattel mortgage? If so, attach a copy of the chattel mortgage to your answer.

Yes. (See copy attached hereto.)

5. At the time of the alleged unlawful seizure by Francis J. Reilly of the chattels listed in response to interrogatory 1, state:

(A) The total amount unpaid under your conditional sales contract, if any, relating to those chattels.

(B) The total amount unpaid under your chattel mortgage, if any, relating to those chattels.

With the qualification made in answering interrogatory No. 1, the amount due under the conditional sales contract on January 31, 1948, was \$14,945.84 and the amount due under the chattel mortgage was \$23,562.27.

6. As to each chattel listed in response to interrogatory 1, state the following:

(A) Whether or not you are still in possession of the chattel.

No.

(B) Whether or not you have sold the chattel since the date of the alleged wrongful seizure of the chattel by Francis J. Reilly; and if such sale has been made, state the sales price, name and address of purchaser and date of sale.

Item	Sales Price	Purchaser	Date of Sale
DW10 #IN2581 and CW-10 Scraper #425.....	\$10,500.00	Murrietta Farms Rt. 1, Box 40, Firebaugh	3/9/48
DW10 #IN2583 and CW-10 Scraper #430.....	10,500.00	Budd & Quinn P.O. Box 1786, Fresno	5/26/48
DW10 #IN2173	4,500.00	Santa Fe Rock & Gravel, 922 J St., Modesto	8/23/48
DW10 #IN2792 and CW-10 Scraper #566	11,150.31	Harold Utenmill 8th and P Sts., Mendota, Calif.	12/30/48
DW10 #IN2167 and CW-10 Scraper #145	5,131.03	Harold Utenmill 8th and P Sts., Mendota, Calif.	12/30/48
DW10 #IN2791 and CW-10 Scraper #568.....	9,572.53	Harold Utenmill 8th and P Sts., Mendota, Calif.	12/30/48
1946 Ford Pickup	1,000.00	McAuley Motors	2/6/48
1942 Chev. Coupe.....	1,200.00	744 W. 17th St., Mereed	2/6/48

/s/ E. H. HALTON.

Duly verified.

Shipped

19

Order No

HALTON TRACTOR COMPANY, a partnership, of MERCED, CALIFORNIA, hereinafter known as the COMPANY, agrees to sell

and Alfred L. ... hereinafter known as the PURCHASER, agrees to buy2 - Case Tractor IN2791 + IN2792 } 25,850.10
2 - La Porte - Case #561 + 562 } 646.25

Paid in

Paid

DOLLARS: 26,496.35627.2220,219.06

hereinafter known and described as "Equipment," for which the Purchaser agrees to pay in Lawful Money of the United States of

America, to HALTON TRACTOR COMPANY, at its office, Merced, California, a total purchase price Twenty-six thousandfour hundred ninety-six and 22/100

Cash on or before delivery

Property in trade valued at

and the balance of said purchase price 20,219.06As Follows: Execution upon payment of three hundred twenty five dollars (\$325.00) byJune 1st, 1947, in one payment \$1094.22 November 1st 1948.

on 19 on 19 on 19 on 19

on 19 on 19 on 19 on 19

on 19 on 19 on 19 on 19

with interest on deferred payments at the rate of 7 per cent per annum from June 1st 1947 to maturity and

per cent after maturity.

This sale is made subject to the following conditions to-wit:

1. The title to said Equipment shall remain wholly and exclusively in the Company, or its assigns, until the full amount of the purchase price, to-

gether with any costs, expenses, and attorneys fees for the collection thereof have been fully paid in cash, when same shall become vested in the Purchaser.

2. The giving or acceptance of any promissory note on account of the purchase price shall have no effect upon the title to the Equipment, but any

notes shall be merely taken as evidence of indebtedness.

3. No transfer, renewal, extension, or assignment of this contract or any interest thereunder, or loss, injury, or destruction of said Equipment shall release

said Purchaser from the obligation hereunder, and any assignee of said Company shall be entitled to all the rights of said Company hereunder.

4. Said Purchaser shall keep said Equipment insured during the continuance of this contract in an amount equal to the unpaid balance of the purchase

price thereof in a company and by a policy or policies satisfactory to the Company. Payment for fire, theft, injury, or destruction of said Equipment shall be de-

livered to the Company upon the execution of this Contract free of all taxes, liens, and encumbrances, shall not be for any interest in this contract or said Equipment.

Said extra care of said Equipment, keeping it in good repair, and order and repair, injury, wear and tear, and any exception shall be made and removed and

Equipment from the State, to which the same is usually shipped by the Company without consent of the Company, and shall be returned in writing. Purchaser agrees, hereby, to return

said Equipment improved and to exhibit to said Company its Agent any or all of said Equipment or improvements. Purchaser agrees, hereby, to return to the benefit of and

rest in the Company, or its assigns.

5. Upon default of any payment or other obligation provided for herein, on the part of the Purchaser, or in the event of a proceeding in bankruptcy

should be instituted by or against the Purchaser, or the Purchaser should make any assignment for the benefit of creditors, or otherwise, the Company, shall have

the right to take any action to secure itself against loss. The Company may, at its option, before the full amount of the purchase price is paid, or the contract is

immediately due and payable, record a lien or liens in any state where such action is taken, and may retain possession of the Equipment until all moneys of the

Purchaser under this Contract, and retaining all payments the entire made as for rent, compensation, and detention, or for its own use, the Company shall

retain possession of the Equipment, holding the Purchaser liable for the contract and take the Equipment as an asset in liquidation or private sale, with or

without notice to the Purchaser, and with or without having such Purchase at the time of sale, and may sell said Equipment upon such terms and in such manner as the Company may determine, and the Company need not bid at any public sale, or from the proceeds of

any such sale, the Company shall deduct all expenses for retaining and selling such Equipment, including a reasonable attorney's fee, and shall apply the balance

to the amount due and remaining unpaid from the Purchase, and any surplus above such amount shall be paid over to the Purchaser, and in no case the

proceeds from such sale after deducting expenses shall not be sufficient to pay the remaining amount of the contract price. The Purchaser shall pay said debt

with interest.

For the purpose of retaking the Equipment under the contract, the Company may enter upon the premises where said Equipment may be, and remove

the same.

6. In the event that suit is instituted by said Company to enforce any of its rights hereunder, said Purchaser agrees to pay an attorney's fee of 10%

plus \$25.00, in the event suit is for the collection of any payment hereunder, and in the event suit is brought for any other purpose, such reasonable attorney's

fee as shall be fixed by the Court.

7. Said Company shall have the right to enforce one or more remedies hereunder successively or concurrently, and such action shall not operate as

a bar or prevent said Company from pursuing any other remedy which it may have hereunder, and any repossession or retention of said Equipment pursuant

to the terms hereof shall not operate to release said Purchaser until full payment of all amounts due hereunder shall have been made in cash.

8. Company shall have the right to take collateral security without thereby affecting the title to the goods offered hereby.

Executed in Triplicate this 19 day of June, 1947, at Merced

HALTON TRACTOR COMPANY

Company

Purchaser

Residence Address of Purchaser:

Company and Purchaser must sign Original and Duplicate, and each should require the surrender and cancellation of both signed documents before signing any other contract affecting this "Equipment."

Item	Sales Price	Purchaser	Date of Sale
DW10 #IN2581 and CW-10 Scraper #425.....	\$10,500.00	Murrietta Farms Rt. 1, Box 40,	3/9/48
DW10 #IN2583 and CW-10 Scraper #430.....	10,500.00	Firebaugh	3/9/48
CW-10 Scraper #136.....	2,250.00	Budd & Quinn P.O. Box 1786, Fresno	5/26/48
DW10 #IN2173	4,500.00	Santa Fe Rock & Gravel, 922 J St., Modesto	8/23/48
DW10 #IN2792 and CW-10 Scraper #566	11,150.31	Harold Utenmill 8th and P Sts., Mendota, Calif.	12/30/48
DW10 #IN2167 and CW-10 Scraper #145	5,131.03	Harold Utenmill 8th and P Sts., Mendota, Calif.	12/30/48
DW10 #IN2791 and CW-10 Scraper #568.....	9,572.53	Harold Utenmill 8th and P Sts., Mendota, Calif.	12/30/48
1946 Ford Pickup	1,000.00	McAuley Motors	2/6/48
1942 Chev. Coupe.....	1,200.00	744 W. 17th St., Merced	2/6/48

/s/ E. H. HALTON.

Duly verified.

Shipped _____ 19 _____ Order No _____

HALTON TRACTOR COMPANY, a partnership of MERCED, CALIFORNIA, hereinafter known as the COMPANY, agrees to sell and Walter H. H. H. H. hereinafter known as the PURCHASER, agrees to buy

2 - Cum tractor IN 2791 + IN 2792
 2 - La Plant - C. in the way #51.1 - 51.8 } 25,950.10

Paid in 646.25
 24496.35
 627.22
 20,219.06

hereinafter known and described as "Equipment," for which the Purchaser agrees to pay in Lawful Money of the United States of America, to HALTON TRACTOR COMPANY, at its office, Merced, California, a total purchase price Twenty-six thousand four hundred ninety-six and 25/100

Cash on or before delivery Paid DOLLARS \$ 26,496.35

Property in trade valued at _____ \$ 627.22

and the balance of said purchase price 20,219.06

As Follows: Security equal payment to three hundred twenty five dollars per month beginning Jan 1st 1947, for one payment 1094.28 November 1st 1948.

\$	on	19	\$	on	19
\$	on	19	\$	on	19
\$	on	19	\$	on	19
\$	on	19	\$	on	19

with interest on deferred payments at the rate of 7 per cent per annum from April 1st 1947 to maturity and per cent after maturity.

This sale is made subject to the following conditions to-wit:

1. The title to said Equipment shall remain wholly and exclusively in the Company, or its assigns, until the full amount of the purchase price, together with any costs, expenses, and attorneys' fees for the collection thereof have been fully paid in cash, when same shall become vested in the Purchaser.
2. The giving or acceptance of any promissory note on account of the purchase price shall have no effect upon the title to the Equipment, but any notes shall be merely taken as evidence of indebtedness.
3. No transfer, renewal, extension, reassignment of this contract or any interest thereunder, or loss, injury, or destruction of said Equipment shall release said Purchaser from his obligation hereunder, any assignee of said Company shall be entitled to all the rights of said Company hereunder.
4. Said Purchaser shall keep said Equipment insured during the continuance of the contract in an amount equal to the unpaid balance of the purchase price thereof in a company and by a policy or policies satisfactory to the Company, covering the fire, theft, and any other risks which may be desired by the Company upon the execution of this Contract, free of all taxes, liens, and encumbrances, shall not pay for any insurance in this contract. In said Equipment shall take extra care of said Equipment, keeping it at all times in good order and repair, ordinary wear and tear excepted, and shall immediately remove and replace any part of the Equipment from the State, to which the same is originally shipped by the Company without consent of the Company first had and obtained in writing. Purchaser shall produce and exhibit to said Company or its Agent any or all of said Equipment at any time. Purchaser agrees that any person who is not a part of said Equipment improvements made thereon, or replacements thereof shall become a component part of said Equipment and shall inure to the benefit of and vest in the Company, or its assigns.
5. Upon default of any payment or other obligation provided for herein, on the part of the Purchaser, or in the event a proceeding in bankruptcy should be instituted by or against the Purchaser, or the Purchaser should make any assignment for the benefit of creditors, or whenever the Company shall desire it to its interests so to do to secure itself against loss, the Company may at its option, declare the full amount of the purchase price due and payable immediately due and payable, regardless of whether any time have been taken, and may retake possession of the Equipment and all rights of the Purchaser under this Contract, and retaining all payments if the entire made as for rent, compensation and delivery, and may, at its option, re-lease possession of the Equipment, holding the Purchaser liable on the contract and resell the Equipment at public auction or private sale, with or without demand for performance, and with or without notice to the Purchaser, and with or without buying such Purchaser at the expense of sale, and may sell said Equipment upon such terms and in such manner as the Company may determine, and the Company shall have bid at any public sale, and shall receive the balance to the amount due and remaining unpaid from the Purchaser, and any surplus above such amount shall be paid over to the Purchaser, and in the event the proceeds from such sale after deducting expenses shall not be sufficient to pay the remaining amount of the contract price, the Purchaser shall pay said deficiency with interest.

For the purpose of retaking the Equipment under the contract, the Company may enter upon the premises where said Equipment may be, and retake the same.

6. In the event that said Contract is instituted by said Company to enforce any of its rights hereunder, said Purchaser agrees to pay an attorney's fee of 10% plus \$25.00 in the event suit is for the collection of any payment hereunder, and in the event suit is brought for any other purpose, such reasonable attorney's fee as shall be fixed by the Court.

7. Said Company shall have the right to enforce one or more remedies hereunder successively or concurrently, and such action shall not operate to stop or prevent said Company from pursuing any other remedy which it may have hereunder, and any representation or retaking of value of said Equipment not event to the terms hereof shall not operate to release said Purchaser until full payment of all amounts due hereunder shall have been made in cash.

8. Company shall have the right to take collateral security without thereby affecting the title to the goods covered hereby.

Executed in Triplicate this 19 day of April 19 47 at Merced

HALTON TRACTOR COMPANY
Walter H. H. H. H. Company
Walter H. H. H. H. Purchaser

Company and Purchaser must sign Original and Duplicate, and each should require the surrender and cancellation of both signed documents before signing any other contract affecting this "Equipment."

Printed Address of Purchaser: _____



Mortgage of Chattels

Symbol No. 5 336

This Mortgage made this 24th day of March, 1947, by Lloyd Watson, 338 K Street of Los Banos, State of California, by occupation Contractor, Mortgagor, to The Morris Plan Company of California, a California corporation, by occupation Industrial Loan Company, Mortgagee,

Witnesseth:

1. The said Mortgagor hereby mortgage to the said Mortgagee all of that certain personal property described as follows, to wit:

In accordance with Schedule "A" attached hereto and hereby made a part of this chattel mortgage.

Schedule "A"

Attached to and hereby made a part of that certain chattel mortgage by Lloyd Watson, 338 K Street, Los Banos, California, to the Morris Plan Company of California, 715 Market Street, San Francisco, California, dated March 24, 1947.

2 D8 Caterpillar Tractors, Serial Nos. IH-3676 and IH-2509.

4 DW10 Caterpillar Tractors, Serial Nos. IN-2581, IN-2582, IN-2167, IN-2173.

1 LeTourneau Carryall, Serial No. FRS-26269-FP-B.

1 LeTourneau Model F.P. Carryall, Serial No. S-26270-FP-B.

1 Woolridge Carryall, Model T.C.R., Serial No. S573.

4 LaPlant Choate Carryall, Serial Nos. CW10430, CW10-425, CW10-145, CW10-136.

2 LeTourneau Double Drum Power Control Unit, Serial Nos. 9R1034, P6596-R8C.

1 LeTourneau Power Control Unit, Model TA, Serial No. P6959TA.

1 Southwest Rooter (3 Standard), Serial No. 11607.

1 Model XD8 Soule Straight Dozer, Ser. No. IS-155.

As security for (A) the payment to the Mortgagee of Forty-seven Thousand One Hundred and no/100 Dollars (\$47,100) at an agreed rate of charge of \$3,587.00; and in event of prepayment or default of more than 15 days, interest, charges, collection costs and attorney fees at the highest rate allowed by the Industrial Loan Act, according to the terms of a certain promissory note of even date herewith executed and delivered by mortgagor unto mortgagee and any renewals thereof; and

(B) The payment of any further sums of money which may hereafter be loaned or advanced by mortgagee unto mortgagor not to exceed the maximum amount of \$40,000.00, such maximum amount being only the limit of the debts, sums, expenditures, indebtedness and obligations that may be secured hereby at any one time and does not

include such as may have been repaid or discharged hereunder; and

(C) The payment to the mortgagee of all other moneys that are now or may become due and payable unto mortgagee from mortgagor.

2. Mortgagor hereby warrants that he is the owner and in possession of all the aforesaid personal property, and that the same is free and clear of all liens and encumbrances.

Mortgagor Promises and Agrees

3. That he will pay all sums secured hereby, and fully perform all covenants herein contained.

4. That he will not dispose of said personal property, nor permit any liens to be placed thereon, nor allow the same to be taken from his custody or control, nor remove the same without the written consent of the mortgagee.

5. That all additions, accretions, improvements and repairs to said personal property or any part thereof shall immediately become subject to all of the provisions of this mortgage and be bound by the lien thereof.

6. That he will not allow said personal property to be in any way injured or damaged, but shall keep it in good repair, all at his own expense, reasonable wear and tear excepted.

7. That he will not use nor permit said personal property to be used for hire, unless endorsed hereon in writing; nor shall he use or allow said

personal property to be used for an illegal purpose.

8. That he will keep said personal property insured against loss at his own expense in such companies as mortgagee approves with the loss payable unto mortgagee, for an amount equal to the aggregate sum unpaid hereunder. The policy of insurance shall be delivered to the mortgagee, who will hold it until all of the terms and conditions of this mortgage have been fully met. Should the mortgagor fail to deliver the policy of insurance to the mortgagee upon the signing and delivery of this contract, the mortgagee is authorized to insure said personal property as is herein provided. The moneys so expended shall be immediately due and payable from mortgagor to mortgagee, payment thereof being secured by this mortgage.

Proceeds of any insurance, whether paid by reason of loss, injury or return of premium, shall be used toward replacement of said personal property or payment of mortgagor's obligation hereunder as mortgagee may elect. Mortgagee may collect, compromise, receipt for, or discharge on such terms as it may deem advisable, any claim for insurance for loss, destruction or theft of said personal property, or damage thereto, however caused, to which the mortgagor may have any right, claim or interest.

9. That he will pay, prior to their becoming delinquent, any taxes, liens, repairs, storage, handling and other charges or assessments which may be levied or accrue against said personal property;

and in the event of his failure to do so, mortgagee is authorized to pay them, and the moneys so expended shall be immediately due and payable from mortgagor to mortgagee in the maximum amount allowed by law, payment thereof being secured by this mortgage.

10. That he will pay, in the event this mortgage is referred to an attorney for any action whatsoever, an attorney fee, together with all court costs and expenses of whatsoever nature, kind or description incurred by the mortgagee in the maximum amount allowed by law.

It Is Mutually Agreed

11. If the mortgagor shall fail to make payment of any part of the principal or interest as provided in the promissory note secured hereby, or if any breach be made of the terms and conditions of said promissory note or any obligation herein contained, then the whole principal sum unpaid on said promissory note, with interest accrued thereon, together with all other sums due and owing, payment of which is secured hereunder, shall immediately become due and payable at the option of the mortgagee. Mortgagee shall thereupon be entitled to immediate possession of all of said personal property, or any part thereof, and it may at once proceed to foreclose this mortgage in accordance with the provisions of the Code of Civil Procedure of the State of California; or it may at its option take possession of said personal property according to law and take such measures as it may deem necessary and

proper for the protection thereof, and whether or not possession has been taken, sell said personal property, or any part thereof, as a pledge or otherwise at a public or private sale, after there shall have been mailed at least five days written notice to the mortgagor at his last known address of the time, date and place of said sale, and reimburse itself from the proceeds of sale, in the maximum amount allowed by law, for all costs and charges incurred or expended by it, including specifically all attorney fees, applying the balance of moneys received from said sale toward the payment of all sums due mortgagee and secured hereby, and dispose of any remaining funds as provided by law.

12. In any sale made hereunder mortgagor expressly waives demand for performance and notice of the time and place of said sale, except as hereinbefore provided; agrees that said property need not be at the place of said sale, and consents that the mortgagee shall have the right to bid upon and purchase all or any part of said personal property at any sale so held hereunder. In any Bill of Sale executed upon a sale of said personal property as herein provided, the recital of the amount of the indebtedness, default, posting of notices of sale, sale and purchase price shall be conclusive proof thereof. Upon delivery of such a Bill of Sale, the purchaser or purchasers shall be entitled to immediate possession of the personal property thereby sold.

13. If during the existence of this mortgage there be commenced or pending any suit, action or

proceeding affecting said personal property or any part thereof, or if any adverse claim for or against said personal property or any part thereof be made or asserted, then the mortgagee may appear in such suit, action or proceeding and retain counsel therein and defend the same or otherwise take such action therein as it may deem advisable and may settle or compromise the same or any adverse claim; and for any of such purposes, it may expend such sums of money as it may deem necessary. The moneys so expended shall be immediately due and payable from mortgagor to mortgagee, to the maximum allowed by law, payment thereof being secured by this mortgage.

14. Mortgagee may at any time, without notice, release any part of said personal property from the lien of this mortgage without affecting the personal liability of any person on the note secured hereby. Such release shall not affect the lien of this mortgage upon the residue of said personal property.

15. This agreement is binding upon the heirs, executors, administrators, assigns or successors in interest of the whole or any part of the personal property herein mortgaged, and each party hereto.

16. Time is expressly of the essence hereof; and it is specifically agreed that no waiver by the mortgagee of any breach or default of or by the mortgagors of the terms and conditions of this mortgage or the note hereby secured shall be deemed a waiver of any breach or default thereafter occurring.

17. This mortgage secures an obligation entered into under the provisions of the Industrial Loan Act of this State and all charges whether interest, attorney fees or whatsoever contracted for herein are subject to and shall not exceed the maximum charge allowed by that act.

In Witness Whereof, the mortgagor has hereunto set his hand the day and year first above written.

LLOYD WATSON.

State of California,
City and County of San Francisco—ss.

On this 24th day of March, 1947, before me, E. J. Casey, a Notary Public in and for said County and State, residing therein, duly commissioned and qualified, personally appeared Lloyd Watson personally known to me to be the person described in and whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Seal] E. J. CASEY,

Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires Oct. 9, 1947.

Recorded at request of The Morris Plan Company at 9:00 a.m., Vol. 857, Official Records, Pg. 229, March 29, 1947; Merced County Records.

W. T. WHITE,
Recorder;

ELLEN LATOUR,
Deputy Recorder.

2.50 Pd. Folie 21. Copied 7. Indexed 2. Compared 3/4.

State of California,
County of Merced—ss.

I, S. E. Acker, County Recorder of the County of Merced, State of California, do hereby certify that I have compared the foregoing copy of Mortgage of Chattels with the original record of same Vol. 857 of Official Records at Page 229 in my office, and that the same is a correct transcript therefrom and of the whole thereof.

Witness my hand and official seal, this 18th day of November, 1953.

[Seal] S. E. ACKER,
County Recorder;

By ELSIE ARREAGA,
Deputy Recorder.

Receipt of copy acknowledged.

[Endorsed]: Filed March 4, 1955.

[Title of District Court and Causes.]

Nos. 32133 and 32134

MEMORANDUM FOR JUDGMENT

The basic issue in these consolidated cases is Whether the plaintiffs were coerced into paying to the Government taxes owed by a third party. Acting on behalf of the Halton Tractor Company and Wes Durston, Inc., Edward H. Halton paid social security and withholding taxes that were owed to the Federal Government by Lloyd Watson; the defendant claims that Halton was a volunteer.

Lloyd Watson used certain tractors and equipment in the operation of his contracting business. During 1947 Watson encountered financial difficulties, and on September 16, 1947, the Government filed a lien against Watson's property for unpaid taxes. Watson's tractors and equipment were either encumbered by a chattel mortgage, or sold to him under a conditional sales contract, which were in existence prior to the government lien. After the lien was filed Halton paid off a mortgage secured by some of Watson's equipment, and Durston bought a conditional sale contract covering some more of Watson's equipment, thereby acquiring the security position of Watson's mortgagee and conditional vendor. Watson agreed that Halton should repair and resell the equipment covered by the mortgage and conditional sale contract, and that Watson's equity would be applied to the purchase of new equipment. In January of 1948, before the equip-

ment was repaired and resold, Halton had some conversations with Francis J. Reilly, an agent of the Internal Revenue Service.

Reilly told Halton about the Government lien on Watson's equipment, saying that it was superior to any interest that Halton or Durston had in that equipment; he also told Halton that the Government could seize the equipment and sell it at a forced sale. The proceeds of a forced sale would have been much less than the amount eventually realized when Halton did repair the equipment and sold it over a period of a year. Reilly believed that the Government could require the proceeds of any sale to be applied first to Watson's tax liability, and he convinced Halton of this proposition. The actual legal effect of a rather complex series of security transactions which led up to the acquisition by Halton and Durston of their interests in Watson's equipment, was that Halton and Durston succeeded to the rights of their predecessors, and therefore the Government lien was inferior to plaintiffs' interests; but it was reasonable for Halton to believe otherwise, because of the complexity of the preceding transactions and because Reilly, the agent of the Government, emphatically told him that the Government lien had priority. Furthermore Reilly taped labels on the equipment which bore the words "Property of the United States Government."

Acting under his belief that the Government could force a sale of Watson's equipment in its un-repaired condition, and could insist that proceeds of

a sale be applied first to Watson's tax liability, Halton paid the taxes in question, acting on behalf of both plaintiffs. Plaintiffs contend here that they paid Watson's taxes under duress of goods; that is, that they paid the taxes because they believed it was the only way they could have saved their interest in the equipment from seizure and sale by the Government. A good definition of duress is referred to in *Weir v. McGrath*, S.D. Ohio, 52 F.2d 201 202-203:

“In the case of *Radich v. Hutchins*, 95 U. S. 210, 213, 24 L. Ed. 409, the court says: ‘To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary * * * there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment.’ ”

This doctrine is particularly applicable to the facts of the case at bar: here the plaintiffs reasonably believed that the Government possessed a power over their property from which they had no means of immediate relief other than by making the payment demanded by the Government's agent. It is a conclusion of this Court that the Government lien was actually inferior to plaintiffs' interests in Watson's equipment, and that the Government could only have sold Watson's equity in the equipment.

Therefore the seizure and sale threatened by the Government's agent constituted a threat of unlawful Government action. In *Robertson v. Frank Brothers Company*, 132 U. S. 17, 23, a case in which an importer paid an unlawfully assessed duty in order to avoid a heavy penalty and to get immediate possession of his perishable goods, the Court made the following instructive comments on the nature of duress:

“The ultimate fact * * * was the moral duress not justified by law. When such duress is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary. * * * When the duress has been exerted by one clothed with official authority, or exercising a public employment, less evidence of compulsion or pressure is required * * *”

See also *Stahmann v. Vidal*, 305 U. S. 61, 66, and *Atchison, etc., Ry. Co. v. O'Connor*, 223 U. S. 280.

In the case at bar the Government's agent put labels on the equipment indicating that they were the property of the United States. He also insisted to Halton that Halton would have to pay Watson's taxes before Halton would be permitted to repair and resell the equipment. Halton had paid \$25,-930.00 for his interest in Watson's equipment and Durston had paid \$30,100.00 for his interest. Watson's tax liability was in the amount of \$7,777.97. If the equipment had been sold all at once at a

forced sale in its unrepaired condition, and if the Government could have insisted that the proceeds of such a sale be applied first to the discharge of the tax liability, Halton and Durston would have suffered very heavy losses. In view of these facts it is the opinion and conclusion of this Court that plaintiffs paid Watson's taxes under duress, since they acted under an immediate and urgent necessity to prevent a seizure of their property. These facts indicate that plaintiffs had no donative intent when they paid Watson's taxes. Our Court of Appeals said in *Parsons v. Anglim*, 9th Cir., 143 F.2d 534, 537:

“* * * it is obvious that it is the volition of intent to donate which is determinative, not the absence of coercion in the mere act of handing the moneys to the Collector along with the protest that he does not owe it.” (Emphasis by the Court of Appeals.)

Defendant raises a procedural point. Defendant contends that this Court cannot consider the Government lien inferior to Halton's interest in the equipment because in order to prove the priority of his interest, Halton must rely upon a document (a chattel mortgage formerly held by the Morris Plan) that was not brought to the attention of the Commissioner in connection with the administrative claim for refund of the taxes in question. But the letter in which the Commissioner informed Halton that his claim for refund was disallowed, recognizes that Halton (as the Halton Tractor Company) had title to some of the equipment; that Watson had

only an equity in that equipment; and that the Government's lien could apply only to Watson's equity in the equipment. Therefore there is nothing to the contention that the Commissioner was deprived of the opportunity to consider the claim for refund from the standpoint of Halton's interest being superior or prior to that of the Government.

Defendant also contends that when Halton repaired and resold Watson's equipment, the net proceeds from selling the equipment were greater than the amounts owed by Watson on the equipment, and that therefore Watson did have an equity which was subject to the Government lien. Watson owed Durston (Wes Durston, Inc.), \$30,-100.00 and Durston realized \$30,500.00 on the resale of the equipment in which he had an interest; but Durston paid out over \$1,000 for parts and repairs before selling that equipment. Thus Watson would not have been entitled to any payment whatever from the proceeds of the sale and there was nothing to which the Government lien could apply. Watson owed Halton \$44,596.10 including interest and taxes paid by Halton on Watson's account; Halton spent \$6,517.37 for repairing equipment he sold. The total of these two figures is \$51,113.47. Halton received \$57,807.97 as the proceeds of selling the equipment. When the amount owed to Halton and the amount Halton spent in repairs are deducted from the proceeds of the sale, that leaves \$6,694.50, which might be referred to as the gross profit from the sale of the equipment. The several documents which evidence Halton's security interest

in the equipment in question all provide that Halton is entitled to be reimbursed for the expenses involved in the repossession and resale of the equipment. Halton has claimed various items of expense, some of which are challenged by the defendant as unjustified. It is not necessary for this Court to pass upon the validity of all of the items claimed because at least one of them is justifiable, and it amounts to \$7,931.25, which is sufficient in itself to wipe out any profit from the resale of the equipment. This item is termed "sales department operating expenses," and was arrived at by allocating to the sale of Watson's equipment a portion of the annual cost of running Halton's used equipment sales department, according to the ratio which the proceeds of the sale of Watson's equipment bore to the total used equipment sales for that year. Therefore this Court finds as a matter of fact that Watson was not entitled to have any of the proceeds of the resale of the equipment paid to him, and that neither plaintiff received anything of Watson's that the Government could reach.

Judgment is awarded to plaintiffs as prayed for. Counsel for plaintiffs shall prepare and present findings of fact, conclusions of law and a judgment in accordance herewith.

Dated: June 5, 1956.

/s/ OLIVER J. CARTER,

United States District Judge.

[Endorsed]: Filed June 5, 1956.

[Title of District Court and Cause.]

No. 32133

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the Honorable Oliver J. Carter, judge of the above-entitled court, on the 9th and 10th days of March, 1955. Plaintiff appeared by its attorneys, Henry M. Jonas and Roy A. Sharff, and defendant appeared by its attorneys, Lloyd H. Burke and George A. Blackstone. The cause proceeded to trial upon the complaint of plaintiff and the answer of the defendant thereto, and evidence both oral and documentary was offered and received by the court. Counsel for the parties to this cause submitted written briefs and arguments on behalf of their respective clients, and the cause being submitted to this court for decision, the court does hereby find the following as the facts:

Findings of Fact

I.

That the plaintiff, Halton Tractor Company, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, maintaining its principal office at Merced, California.

II.

That James G. Smyth, the former Collector of Internal Revenue for the United States of America

for the District of Northern California, is no longer in office, and that therefore suit may be brought against the United States of America pursuant to Section 1346 of Title 28, United States Code.

III.

That this action arises under the laws of the United States for Internal Revenue, and particularly under Section 3772 of Title 26 of the United States Code.

IV.

That at the times involved in this action one Lloyd H. Watson was indebted to the United States of America for Social Security and withholding taxes. That at certain of the times hereinafter referred to, said Lloyd H. Watson was the purchaser under a conditional sales contract and the mortgagor of certain tractors, earth-moving machinery and equipment used in connection therewith. That said conditional sales contract was between the plaintiff Halton Tractor Company as vendor, and said Lloyd H. Watson as vendee, and the Morris Plan Company of San Francisco, California, was the mortgagee in said chattel mortgage, but at the time of the acts of one Francis J. Reilly, hereinafter referred to, plaintiff was the owner of the said chattel mortgage as well as the said conditional sales contract. That at the time of the acts of said Francis J. Reilly hereinafter referred to said Lloyd H. Watson had defaulted in the making of the payments due under the promissory note secured by said chattel mortgage and otherwise breached the terms and condi-

tions of said chattel mortgage and also the payments due under said conditional sales contract were in default; that therefore the said Lloyd H. Watson had surrendered all said machinery and equipment to plaintiff; and that all said equipment was at said time in the possession of plaintiff and not in the possession of said Lloyd H. Watson.

V.

That on or about the end of the month of January, 1948, said Francis J. Reilly as a deputy collector of the Department of Internal Revenue, attached to said machinery and equipment a notice, as follows: "Property of the United States Government (Notice of Seizure)"; thereby said Francis J. Reilly purported to seize said machinery and equipment as the property of said Lloyd H. Watson, and thereupon said Francis J. Reilly informed plaintiff that he intended to, and he threatened to, proceed to sell said machinery and equipment to satisfy said indebtedness of said Lloyd H. Watson to the United States of America.

VI.

That the said Francis J. Reilly informed plaintiff that all its rights in and to the said machinery and equipment were inferior and secondary to the rights of the United States of America to sell said machinery and equipment and apply the proceeds of such sale first to the said indebtedness of said Lloyd H. Watson to the defendant United States of America, and informed plaintiff he could and would proceed with the sale of said property unless plain-

tiff paid the taxes due from said Lloyd H. Watson to defendant United States of America; and that plaintiff believed from the statements and acts of said Francis J. Reilly that its rights under said chattel mortgage and said conditional sales agreement in and to said property were inferior and secondary to the rights of the United States of America, and therefore to save itself from financial loss and to prevent the sale and the loss of said machinery and equipment to it, plaintiff paid the sum of \$2,000 to the defendant United States of America on the 20th day of February, 1948, and a sum of \$3,877.97 on the 15th day of March, 1948, in partial satisfaction of said taxes due from Lloyd H. Watson. That at all times prior to the payment of said sums of money by plaintiff to defendant it believed that if said Francis J. Reilly proceeded to sell said equipment, as he threatened, the same would be taken from the possession of plaintiff by the purchasers at such sale and forever lost to plaintiff.

VII.

That said Francis J. Reilly, at said times prior to the payment of said sums of money by plaintiff to the defendant, informed plaintiff, and plaintiff believed that the only method by which plaintiff could proceed to protect its rights in the situation was by paying to the Department of Internal Revenue the amount of said taxes due from said Lloyd H. Watson and then file a claim for refund from the United States of America upon the ground it

had paid the taxes due from someone else, to wit: Lloyd H. Watson.

VIII.

That on or about the 15th day of March, 1950, plaintiff filed in the office of the Collector of Internal Revenue at San Francisco, California, its claim for refund of the said sums of money, a true copy of which said claim is attached to the complaint of plaintiff hereto marked Exhibit A and incorporated herein by reference. That the defendant in the proceedings before the Commissioner of Internal Revenue upon said claim conceded that the machinery and equipment which said Francis J. Reilly attempted to seize and distrain was not owned by the said Lloyd H. Watson, but that he had only an equity therein and admitted that plaintiff had an interest therein; that said Commissioner of Internal Revenue rejected said claim upon the ground that because said Lloyd H. Watson had an equity in said machinery and equipment the sale thereof as threatened by said Francis J. Reilly could only sell his equity and that therefore said payments by plaintiff were voluntary and plaintiff had no right to recover the same; and that the said claim was rejected by the Collector of Internal Revenue under date of December 15, 1950, and plaintiff was so notified by registered mail.

IX.

That after paying said sums to the United States of America plaintiff repaired and reconditioned said machinery and equipment and sold the same in the

regular course of its business, but that the proceeds from the sale of the same were insufficient to reimburse plaintiff for the moneys due and chargeable under the said chattel mortgage, the said conditional sales contract, and the costs of repairing, reconditioning and reselling said machinery and equipment so that plaintiff did not recover from the sale of said machinery and equipment any part of the said moneys paid to the United States of America.

And from the foregoing Findings of Fact the Court does conclude as follows:

Conclusions of Law

1. That the plaintiff Halton Tractor Company paid the sum of \$5,877.97 to the United States of America under duress.

2. That the said claim filed by the plaintiff was upon the same ground that plaintiff asserted as the basis of its rights to recover in this case, and the Commissioner of Internal Revenue was sufficiently apprised of the facts constituting the claim of plaintiff to allow the Commissioner to consider and pass upon the said claim of plaintiff for refund of said moneys paid to defendant.

3. That the plaintiff is entitled to recover judgment against the United States of America for the sum of \$5,877.97 plus interest thereon at the rate of 6% per annum on the sum of \$2,000 from February 20, 1948, and interest at the rate of 6% per annum on the sum of \$3,877.97 from March 15,

1948, together with costs and disbursements of this action.

Let judgment be entered accordingly in favor of plaintiff and for its costs of suit incurred herein.

Dated this 30th day of July, 1956.

/s/ OLIVER J. CARTER,
United States District Judge.

Affidavit of Service by Mail attached.

Lodged July 11, 1956.

[Endorsed]: Filed July 30, 1956.

[Title of District Court and Cause.]

No. 32134

Findings of Fact and
Conclusions of Law

The above-entitled cause came on regularly for trial before the Honorable Oliver J. Carter, judge of the above-entitled court, on the 9th and 10th days of March, 1955. Plaintiff appeared by its attorneys, Henry M. Jonas and Roy A. Sharff, and defendant appeared by its attorneys, Lloyd H. Burke and George A. Blackstone. The cause proceeded to trial upon the complaint of the plaintiff and the answer of the defendant thereto, and evidence both oral and documentary was offered and received by the court. Counsel for the parties to this cause sub-

mitted written briefs and arguments on behalf of their respective clients, and the cause being submitted to this court for decision, the court does hereby find the following as the facts:

Findings of Fact

I.

That the plaintiff, Wes Durston, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, maintaining its principal office at Los Angeles, California.

II.

That James G. Smyth, the former Collector of Internal Revenue for the United States of America for the District of Northern California, is no longer in office, and that therefore suit may be brought against the United States of America pursuant to Section 1346 of Title 28, United States Code.

III.

That this action arises under the laws of the United States for Internal Revenue, and particularly under Section 3772 of Title 26 of the United States Code.

IV.

That at the times involved in this action one Lloyd H. Watson was indebted to the United States of America for Social Security and withholding taxes. That at certain of the times hereinafter referred to said Lloyd H. Watson was the purchaser

under a conditional sales contract of certain tractors, earth-moving machinery and equipment used in connection therewith. That at all times herein mentioned the plaintiff was the real owner of the said conditional sales agreement. That at the time of the acts of one Francis J. Reilly, hereinafter referred to, said Lloyd H. Watson had defaulted in the payments due under said conditional sales agreement and therefore said Lloyd H. Watson had surrendered all said machinery and equipment to plaintiff; and that all said equipment was at said time in the possession of plaintiff and not in the possession of said Lloyd H. Watson.

V.

That on or about the end of the month of January, 1948, said Francis J. Reilly as a deputy collector of the Department of Internal Revenue, attached to said machinery and equipment a notice, as follows: "Property of the United States Government (Notice of Seizure)"; thereby said Francis J. Reilly purported to seize said machinery and equipment as the property of said Lloyd H. Watson, and thereupon said Francis J. Reilly informed plaintiff that he intended to, and he threatened to, proceed to sell said machinery and equipment to satisfy said indebtedness of said Lloyd H. Watson to the United States of America.

VI.

That the said Francis J. Reilly informed plaintiff that all its rights in and to the said machinery

and equipment were inferior and secondary to the rights of the United States of America to sell said machinery and equipment and apply the proceeds of such sale first to the said indebtedness of said Lloyd H. Watson to the defendant United States of America, and informed plaintiff he could and would proceed with the sale of said property unless plaintiff paid the taxes due from said Lloyd H. Watson to defendant United States of America; and that plaintiff believed from the statements and acts of said Francis J. Reilly that its rights under said conditional sales agreement in and to said property were inferior and secondary to the rights of the United States of America, and therefore to save itself from financial loss and to prevent the sale and the loss of said machinery and equipment to it, plaintiff paid the sum of \$3,900 to the defendant United States of America on the 23rd day of February, 1948, in partial satisfaction of said taxes due from Lloyd H. Watson.

VII.

That at all times prior to and at the time of the payment of said sum of money by plaintiff to defendant, it believed that if said Francis J. Reilly proceeded to sell said equipment as he threatened, the same would be taken from the possession of plaintiff by the purchasers at such sale and forever lost to plaintiff.

VIII.

That said Francis J. Reilly, at said times prior to the payment of said sums of money by plaintiff to

the defendant, informed plaintiff, and plaintiff believed that the only method by which plaintiff could proceed to protect its rights in the situation was by paying to the Department of Internal Revenue the amount of said taxes due from said Lloyd H. Watson and then file a claim for refund from the United States of America upon the ground it had paid the taxes due from someone else, to wit: Lloyd H. Watson.

IX.

That on or about the 15th day of March, 1950, plaintiff filed in the office of the Collector of Internal Revenue at San Francisco, California, its claim for refund of the said sums of money, a true copy of which said claim is attached to the complaint of plaintiff hereto, marked Exhibit A, and incorporated herein by reference. That the defendant in the proceedings before the Commissioner of Internal Revenue upon said claim conceded that the machinery and equipment which said Francis J. Reilly attempted to seize and distrain was not owned by the said Lloyd H. Watson, but that he had only an equity therein and admitted that plaintiff had an interest therein; that said Commissioner of Internal Revenue rejected said claim upon the ground that because the said Lloyd H. Watson had an equity in said machinery and equipment and the sale thereof as threatened by said Francis J. Reilly could only sell his equity and that therefore said payments by plaintiff were voluntary and plaintiff had no right to recover the same; and that the said claim was rejected by the

Collector of Internal Revenue under date of December 15, 1950, and plaintiff was so notified by registered mail.

X.

That after paying said sums to the United States of America plaintiff repaired and reconditioned said machinery and equipment and sold the same in the regular course of its business, but that the proceeds from the sale of the same were insufficient to reimburse plaintiff for the moneys due and chargeable under the said conditional sales contract and the costs of repairing, reconditioning and reselling said machinery and equipment so that plaintiff did not recover from the sale of said machinery and equipment any part of the said moneys paid to the United States of America.

From the foregoing Findings of Fact the court does conclude as follows:

Conclusions of Law

1. That the plaintiff Wes Durston, Inc., paid the sum of \$3,900 to the United States of America under duress.

2. That the said claim filed by the plaintiff was upon the same ground that plaintiff asserted as the basis of its rights to recover in this case and the Commissioner of Internal Revenue was sufficiently apprised of the facts constituting the claim of plaintiff to allow the Commissioner to consider and pass upon the said claim of plaintiff for refund of said moneys paid to defendant.

3. That the plaintiff is entitled to recover judgment against the United States of America for the sum of \$3,900 plus interest thereon at the rate of 6% per annum from the 23d day of February, 1948, together with costs and disbursements of this action.

Let judgment be entered accordingly in favor of plaintiff and for its costs of suit incurred herein.

Dated this 30th day of July, 1956.

/s/ OLIVER J. CARTER,
United States District Judge.

Affidavit of Service by Mail attached.

Lodged July 11, 1956.

[Endorsed]: Filed July 30, 1956.

In the United States District Court for the Northern
District of California, Southern Division

No. 32133

HALTON TRACTOR COMPANY, INC., a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial before the Honorable Oliver J. Carter, Judge

of the above-entitled Court, on the 9th and 10th days of March, 1955. Plaintiff appeared by its attorneys, Henry M. Jonas and Roy A. Sharff, and defendant appeared by its attorneys, Lloyd H. Burke and George A. Blackstone. The cause proceeded to trial upon the complaint of plaintiff and the answer of the defendant thereto, and evidence both oral and documentary was offered and received by the Court, and the Court being fully advised in the premises, and having filed herein its Findings of fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed:

1. That plaintiff have judgment against the defendant, United States of America, in the sum of \$5,877.97, with interest thereon at the rate of 6% per annum on the sum of \$2,000.00 from February 20, 1948, and interest at the rate of 6% per annum on the sum of \$3,877.97 from March 13, 1948, together with costs of suit herein.

Done in Open Court this 30th day of July, 1956.

/s/ OLIVER J. CARTER,

United States District Judge.

Lodged July 26, 1956.

[Endorsed]: Filed and entered July 30, 1956.

In the United States District Court for the Northern
District of California, Southern Division

No. 32134

WES DURSTON, INC., a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial before the Honorable Oliver J. Carter, Judge of the above-entitled Court, on the 9th and 10th days of March, 1955. Plaintiff appeared by its attorneys, Henry M. Jonas and Roy A. Sharff, and defendant appeared by its attorneys, Lloyd H. Burke and George A. Blackstone. The cause proceeded to trial upon the complaint of plaintiff and the answer of the defendant thereto, and evidence both oral and documentary was offered and received by the Court, and the Court being fully advised in the premises, and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed:

1. That plaintiff have judgment against the defendant, United States of America in the sum of \$3900.00, with interest thereon at six per cent (6%)

per annum from the 23rd day of February, 1948,
until paid, together with costs of suit herein.

Done in Open Court this 30th day of July, 1956.

/s/ OLIVER J. CARTER,

United States District Judge.

Lodged July 26, 1956.

[Endorsed]: Filed and entered July 30, 1956.

[Title of District Court and Causes.]

Civil Nos. 32133 and 32134

NOTICE OF APPEAL

You Are Hereby Notified that the defendant,
United States of America appeals to the United
States Court of Appeals for the Ninth Circuit from
the judgments entered on July 30, 1956, in the above
actions.

Dated: September 24, 1956.

LLOYD H. BURKE,

United States Attorney;

By /s/ MARVIN D. MORGENSTEIN,

Assistant U. S. Attorney.

[Endorsed]: Filed September 24, 1956.

[Title of District Court and Causes.]

Civil Nos. 32133, 32134

ORDER

Upon ex parte application and good cause having
been shown,

It Is Hereby Ordered that the defendant, United States of America, shall have to and including December 13, 1956, in which to docket the appeals filed in the above-entitled actions.

Dated: October 30, 1956.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed October 30, 1956.

In the United States District Court for the Northern District of California, Southern Division

Nos. 32133, 32134

HALTON TRACTOR COMPANY, a Corporation,
and DURSTON TRACTOR COMPANY,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Before: Hon. Oliver D. Carter, Judge.

REPORTER'S TRANSCRIPT

March 9-10, 1955

Appearances:

For the Plaintiffs:

ROY A. SHARFF, ESQ.,
HENRY JONAS, ESQ.

For the Defendant:

LLOYD H. BURKE,

United States Attorney, by

GEORGE A. BLACKSTONE, ESQ.,

Assistant United States Attorney.

The Clerk: Halton Tractor Company vs. the United States of America; Durston, Inc., vs. the United States of America, for trial.

Mr. Blackstone: Ready for the defendant, your Honor.

Mr. Sharff: Ready for the plaintiff.

The Court: Are these cases consolidated as of yet or are they going to be joint trials? What is the expectation of counsel as to how we proceed in these matters?

Mr. Sharff: Joint trial, your Honor. The evidence in the Halton case and the Durston case in some particulars are the same. The Court would have to hear the duplication of the same testimony. And then, of course, at a certain point they split; but up to a certain point it's common evidence and common testimony, common witnesses.

The Court: Is there any objection to consolidating them for trial?

Mr. Blackstone: No. I think they should be consolidated, your Honor. I don't know if there is any distinct order consolidating them for trial.

The Court: I use the term advisedly because there may be some case where you could proceed together, but I think the order should be made con-

solidating them for trial. We will make the order consolidating them for trial.

The second thing I want to ask is I notice that in the Halton case that written interrogatories were propounded and [3*] answers were given, but that in the Durston case written interrogatories were propounded but I don't know that answers have been filed.

Mr. Sharff: Answers have not been filed, your Honor. However, I have supplied the information requested by the interrogatories to Mr. Blackstone as fast as it was possible to ascertain it to find the information requested in it.

The Court: Is there any problem in that, Mr. Blackstone?

Mr. Blackstone: No, your Honor. As far as I am concerned, I think Mr. Sharff has acted in perfectly good faith. And that although the information we wanted wasn't supplied, I think it's simply because it wasn't available. So we are not going to make any point of that.

Mr. Sharff: We are faced with this problem, your Honor, in respect to Mr. Durston's answers. Mr. Durston liquidated his business in Los Angeles in 1951. His records were stored. His bookkeeper died last July, his brother died in January of this year. They were both with him in the business. He is under great handicap at finding any of the records. It was not until yesterday, in fact, that we were able to supply some of the figures to Mr. Blackstone, which I did.

The Court: Well, are there going to be any contested issues over records in this case?

Mr. Blackstone: There definitely will be. As far as the Halton Tractor Company people is concerned, I don't know [4] what——

The Court: I am talking about the Durston case, I mean, in the difficulty of finding the records. In other words, are we going to have any problems of proof in that situation? If so, I want to know about it in advance.

Mr. Sharff: I don't think so, your Honor. I believe that Mr. Durston's recollection will be sufficient for this trial. If it is desired, there is one record which could be obtained from the C.I.T. Corporation in Los Angeles and there is one individual whom we just located in Los Angeles who might be of some help in the case. But it was very late and he was unwilling to come to San Francisco. So, we are without him. But I do believe we can get through all right, your Honor, without too much difficulty in records.

The Court: How much time would it take to finish this evidence?

Mr. Sharff: I believe it will finish today.

The Court: Do you need the full day to do it?

Mr. Sharff: I believe it will take more than the morning, your Honor. We will be going into the afternoon, I am sure of that.

The Court: What are the contested issues of fact?

Mr. Sharff: As I analyze the proceedings, your Honor, the United States admits our allegations in

both cases, which are the same. They admit the corporate existence of the plaintiffs. [5] They admit that James Smyth, the former Collector of Internal Revenue, is no longer in office and that this suit is therefore brought against the United States in lieu thereof. They admit that the plaintiffs in this case did, within the time set allowed by statute, file their claim for refund of the taxes.

The Court: Well, now, wait a minute. Do they admit that? They admit that a claim for refund was filed on a certain day, but——

Mr. Sharff: Yes.

The Court: But the rest of it is your conclusion.

Mr. Sharff: I am sorry, your Honor; that is correct, your Honor. I am sorry.

The Court: Yes. That may be correct; it may be a correct conclusion, but I don't know that they admit it.

Mr. Sharff: No; they don't, your Honor. And then they admit that this action arises under Section 3772, Title 26, I believe. The complaint said 26—this carbon, I can't tell if it's 26 or 28.

The Court: Yes; I think that is 26.

Mr. Sharff: 26.

The Court: To be sure——

Mr. Sharff: No; I think it is 26.

Mr. Blackstone: That is an error; it's 26, your Honor.

The Court: Then both paragraph 4 of both complaints [6] should be amended to provide that it is Section 3772 of Title 26 instead of Title 28.

Mr. Sharff: Yes. And then the United States Government admits that the claim attached to the complaint was filed with the Internal Revenue Department and that it was rejected by the Commissioner of Internal Revenue on December 15th, 1950. And, of course, your Honor, we filed within the two years thereafter allowed by statute.

From there on, your Honor, I believe the only other issue upon which we are agreed is the fact that the payment of money by the Halton Tractor Company to the United States Government, in which respect, too, we have certain original sets right here in the courtroom to present to the court——

The Court: Well, they admit payment and they admit that the Government agent filed certain notices?

Mr. Sharff: Yes; they do admit that, your Honor.

The Court: And I don't want any proof of those factors except as they may go to some other element of the case. I don't want to rehash anything that is admitted in this case.

Mr. Sharff: We'll present our case as briefly as possible. And I might say, your Honor, if your Honor desires an opening statement from me, I can briefly outline——

The Court: I want to know what you deem to be the contested issues here so I can follow it up.

Mr. Sharff: The contested issues will be, as I understand [7] it from the pleadings, the existence of the conditional sales agreement claimed by the Halton Tractor Company.

The Court: When you say, "the conditional sales agreement," what do you mean?

Mr. Sharff: A conditional sales agreement dated April.

The Court: There are two types of security transactions, one was a—two types of conditional transactions——

Mr. Sharff: There are two types of transactions involved, your Honor. One was a conditional sales agreement, the original of which I have here, a copy of which has been supplied to Mr. Blackstone, dated April 19th, 1947, under which Halton Tractor Company sold to Lloyd Watson—Lloyd Watson. I don't know, your Honor, under it is the taxpayer really involved in this case?

The Court: I understand that.

Mr. Sharff: Yes. And it covered two Caterpillar D-W 10 tractors together with two LaPlant Choate scrapers. That is a conditional sales agreement held by the Halton Tractor Company.

The other security claimed by the Halton Tractor Company is a mortgage of chattels dated the 24th day of March from Lloyd Watson to Morris Plan Company of San Francisco.

The Court: What is the date of that again?

Mr. Sharff: March 24th, 1947. Now, here it may be proper for me to inform the court that Halton Tractor Company [8] claims under the Morris Plan mortgage, on the basis of equitable subrogation, having paid to the Morris Plan at the request of Mr. Watson the balance due thereon and the original

mortgage having been delivered to the Halton Tractor Company and never released——

The Court: Claims under the Morris Plan mortgage?

Mr. Sharff: Yes; under the rule of equitable subrogation, your Honor. I believe that rule is so well established——

The Court: Is that appropriately pleaded?

Mr. Sharff: Well, now, your Honor raises a question I hadn't considered.

Mr. Blackstone: May it please the court——

The Court: Does the Government make any point of it?

Mr. Blackstone: Yes, your Honor. There is no allegation in the complaint whatsoever about a chattel mortgage. We discovered from the answers to interrogatories that although the pleadings suggest that the claimed interest of the plaintiff, Halton Tractor Company, is under the conditional sales agreement, that in response to our request for answers to interrogatories they stated that they have two instruments under which they are claiming the conditional sales agreement as outlined by Mr. Sharff, and a chattel mortgage dated March 24th, 1947, this one he is just now stating, but——

The Court: Well, under the Federal Rules of Civil [9] Procedure which permit what has sometimes been characterized as notice pleadings, does the Government make any point that the issue hasn't been appropriately pleaded? In other words, if they have not been given notice of the claim of the plaintiff in this case——

Mr. Sharff: They were informed by the written interrogatories under——

The Court: I understand that. I am asking the Government if he makes any point of it, if the Government makes any point of it at this time because then if there is a problem I want you——

Mr. Sharff: Yes, your Honor. If there is a point, of course, I will make the appropriate motion to amend at the time.

The Court: Under state pleadings, I would conclude that you probably would have to plead it.

Mr. Sharff: Yes; I believe so, your Honor.

The Court: But under the Federal Rules of Civil Procedure, which are considerably broader in that respect, I am not so sure that you have to plead it so long as you satisfactorily have notified the Government of the nature of your claim.

Mr. Sharff: Yes.

The Court: And so that the Government has the opportunity to defend against it. [10]

Mr. Sharff: And I believe, also, your Honor, we have pleaded that the taxes were wrongfully collected. Probably that is sufficient under the Federal Rules. I just don't know how liberal they are. I don't believe we ever will know until time goes on and on.

The Court: I am inclined to think you are correct on it. But I just raise the point unless there is an argument about it.

Mr. Blackstone: I am in an embarrassing position, your Honor. It does not particularly reflect credit on me. We had previously obtained from the

County Recorder in Merced County a copy of the chattel mortgage dated October 2nd, 1947, executed by Lloyd Watson to Halton Tractor. So that I did know heretofore that they had a chattel mortgage on the property. And when I received—it was not until this very minute that I realized that the mortgage that they submitted in their answers to interrogatories was not this mortgage that I had a photostat of for the County Recorder.

I have been proceeding under the assumption that their claim insofar as the chattels covered by the mortgage is concerned, is the mortgage of October 2nd, 1947, which was not recorded until October 7th, 1947, but——

Mr. Sharff: Pardon me, Mr. Blackstone. Don't you remember taking the deposition of the Morris Plan on a mortgage? [11]

Mr. Blackstone: That is correct, I remember that.

Mr. Sharff: And the Morris Plan mortgage was brought to your attention early last fall?

The Court: Well——

Mr. Sharff: I thought I made a claim to your office the other day. I told you about the Morris Plan issue because it was claimed because of Mr. Halton.

The Court: Are you making any claim under the chattel mortgage, which is mentioned by Mr. Blackstone?

Mr. Sharff: No, your Honor; because that mortgage was after the Government's lien was recorded.

It would therefore be later in time. We would gather no rights under it. However——

The Court: The Government has the position, as I understand it, that their lien attached.

Mr. Sharff: On September 15th, I believe, or 16th.

Mr. Blackstone: September 16th, your Honor.

The Court: Is there any dispute as to that fact?

Mr. Sharff: No; there isn't, your Honor.

The Court: You are claiming then under the right of equitable subrogation to the Morris Plan mortgage having purchased the equitable interest of Morris Plan, is that correct?

Mr. Sharff: That is correct, your Honor, having paid the sum of \$27,930 to the Morris Plan. [12]

The Court: And is there going to be any problem of any subsequent negotiations between the plaintiff here, that is, Halton, and the taxpayer?

Mr. Sharff: No, your Honor; no problem.

The Court: In merging any of these documents or any of these interests and things of that sort?

Mr. Sharff: No, your Honor. I don't believe we will have any problems on that score whatsoever.

The Court: All right. Well, now, do I take it that your contention is that the contested issue is the existence of and the validity of these two documents, the conditional sales contract and the chattel mortgage?

Mr. Sharff: That is two of the contested issues. The other contested issue, and I presume the two other matters on which we will devote most of our evidence, your Honor, will cover the issue of the

exact conversations and circumstances between Mr. Francis J. Reilly, the representative of the United States Department of Internal Revenue, and Mr. Halton, and the circumstances and reasons under which Mr. Halton of the Halton Tractor Company paid this money to the United States Government.

The Court: Well, now, without previously deciding the matter, are those conversations admissible here, and if so, under what theory are they?

Mr. Sharff: They are admissible, your Honor, to show [13] duress of goods, that these payments were not voluntary and were not donations.

The Court: Well, I shouldn't raise the question until we come to it.

Mr. Sharff: I think what is appropriate, your Honor, I would in an opening statement outline to the court so the court might follow, what reasons we are offering this testimony.

The Court: What is the next issue?

Mr. Sharff: The next issue, I presume from my conversation with Mr. Blackstone, will be the matter whether the Halton Tractor Company in the eventual sale and disposition of this property actually suffered a loss over their claims against Mr. Watson, the taxpayer. I believe I correctly state one of the issues which will come in this case.

In other words, I believe that Mr. Blackstone, for the defendant, will contend that Halton Tractor Company did not suffer any loss as a final result of this transaction. I have already supplied Mr. Blackstone with a great deal of figures involved in this transaction already.

The Court: I noticed the answer to the written interrogatories. Are you going to concede that that is an issue? I mean, are you going to take the position that that is a material subject to discussion?

Mr. Sharff: In view of the fact—I believe, your Honor, [14] that it comes into the case on behalf of the defendants and I am prepared to meet it.

The Court: I understand that. But are you going to—the only reason I am asking the question is I want to find out if you are going to contest as to whether or not that is an issue.

Mr. Sharff: No; I won't, your Honor. I won't contest that as being an issue, your Honor, because after all I think the court is interested in knowing whether the Halton Tractor Company was actually caused a loss.

The Court: Is it whether they gained or lost, does it make any difference? I thought the issue here was whether or not they had a prior lien which had attached and which was taken possession under a repossession and that the property was the property of Halton and not the property of Watson, and therefore was not subject to tax.

Mr. Sharff: Well, the facts will appear, your Honor, that the property was not repossessed until after the Government lien had been levied.

The Court: Well, that may well be; but are we going to be in an argument as to whether or not there was an equitable interest of Watson, which was taxable?

Mr. Sharff: You mean which could be levied upon?

The Court: Which could be levied upon.

Mr. Sharff: No, your Honor; there is no argument that [15] there was an equitable interest which could be levied upon by the United States Government.

Mr. Blackstone: What do you mean that there is no argument, Mr. Sharff, on that?

Mr. Sharff: That there was an equitable interest.

Mr. Blackstone: That there was an equitable——

Mr. Sharff: That the United States Government should reach by its lien inasmuch as the property was still in the possession of the taxpayer, your Honor.

The Court: That is the point exactly.

Mr. Sharff: Yes.

The Court: In other words, then, the Court does have the problem of determining the extent, if any, of the equitable interest that was subject to being levied upon for purpose of satisfying unpaid taxes?

Mr. Sharff: Yes, your Honor. I think that we can't avoid that problem. I feel it's squarely in front of us in this case.

The Court: All right. And this fourth point goes to that question?

Mr. Sharff: Yes, your Honor. I might say, your Honor, when the complaint was filed we were under the information that the property had already been repossessed at the time the date the lien was filed. We find the facts to be different, though. [16]

The Court: Well, then, you ought to be able to stipulate as to some facts as to when certain things

occurred. It seems to me that if these instruments were recorded—I don't know about a conditional sales contract—but the chattel mortgage was—you should be able to agree on that.

Mr. Sharff: We should be able to.

The Court: You should be able to agree as to the date the government lien attached if it had a lien and when certain notice——

Mr. Sharff: We will stipulate in that regard.

The Court: When certain notices were given and filed and so on.

Mr. Sharff: Yes, your Honor. We would be willing to do that, perfectly willing to do that. Any stipulations along the line which your Honor suggests, we would certainly be willing.

The Court: What I want to do is avoid a lot of testimony.

Mr. Blackstone: May it please the Court, may I make my statement, because I think to me the issues are not complicated. I would like to——

The Court: I would like to hear.

Mr. Blackstone: My analysis——

The Court: Have you concluded?

Mr. Sharff: In regard to Wes Durston, your Honor, I [17] might say the issues will be just as I have outlined, the conditional sales agreement and the circumstances under which the monies were paid and the amount of loss resulting to Wes Durston, Inc. It will be the same three issues in that regard.

The Court: Is there going to be any question raised about what Watson owed, taxes?

Mr. Sharff: No, your Honor.

The Court: Or in excess of the amounts that were collected here?

Mr. Sharff: No, your Honor.

The Court: No question of that?

Mr. Sharff: No question about that.

The Court: All right.

Mr. Blackstone: May it please the Court, we are not going to raise any issue about the conditional sales contract that Halton Tractor Company had with Watson, nor are we going to raise any issue that there was a conditional sales contract that under which West Durston, Inc., was a conditional seller and Watson was a buyer.

In regard to the chattel mortgage, as I explained before, interrupting Mr. Sharff, it is perhaps negligence on my part, but I, in preparing for the trial, had in mind that they were claiming their interest in some of the chattels under the chattel mortgage dated October 7th, 1947. And I [18] do now recall the deposition that we had. And I remember a statement to Mr. Jonas at that time that I didn't see any necessity in his going into such an elaborate way of qualifying that there was a chattel mortgage; that if he had one, a certified copy from the Recorder's Office would be admissible and his office would prove it, and that we wouldn't raise any issue about that. So if they are prepared to introduce a certified copy of that chattel mortgage that the Morris Plan had and then tie it in with their evidence, that certainly I don't intend to make any further objection; in fact, I don't think I would be in any legal position to do so.

The way I see the case, it comes down to this: That is that there were taxes outstanding assessed against Lloyd Watson. We had a tax lien on file as early as September 16th, 1947. Mr. Reilly, who is a deputy collector of Internal Revenue, after the tax lien was filed, he was making an attempt to collect the taxes from Watson.

The Court: The tax lien was filed what date?

Mr. Blackstone: September 16th, 1947. Prior to that time he had warrants of restraint in his possession and he had contacted Watson on numerous occasions to attempt to collect payment. In fact, as early as August 23rd, I believe it was, 1947, Watson had furnished him with the net worth statement showing total assets and so forth. [19]

After the tax lien was filed, Mr. Reilly, for the first time, was informed or found out that there was a chattel mortgage of record in which Halton Tractor claimed some interest in this property. A conference ensued some time in October or early November of 1947 in Mr. Halton's office in which Mr. Halton agreed with Mr. Reilly that if the property that was subject to the equitable interests of the Halton Tractor Company were taken back by Halton Tractor and sold, Halton Tractor would discharge the entire outstanding taxes owing to the Government by Watson.

Mr. Reilly, before agreeing to that, checked with the Collector in San Francisco. He was given verbal authority to agree to that procedure.

And our main contention in this case is that there was a voluntary oral agreement that the Halton

Tractor Company would sell the property, that the Government would not exercise its right of restraint and sale, and that before any sale would be made by Halton Tractor, they would first discharge the total tax liability of Watson. As far as the Government is concerned, that is all that happened. Certainly the cases are perfectly clear that where a person agrees gratuitously to discharge another person's taxes, he can't thereafter upset the transaction. So that is our primary defense and I think the evidence will sustain that.

Secondly, we do maintain that in the event the sale of [20] the chattels by Halton Tractor Company resulted in more than enough money to discharge the equitable interest in the property of the Halton Tractor people, plus the full amount of the taxes due with some excess—and so our contention is in the event even if there had been no such agreement with the deputy collector, the plaintiffs have not been injured.

Now may I just say a word in regard to the Wes Durston aspect of the case. Mr. Reilly had no dealings whatsoever with the Wes Durston Company. All of his conversations were with Halton; and as far as he knew, Halton was the only one claiming any kind of interest in this equipment other than Watson; and whatever arrangements were made between Halton Tractor Company and Wes Durston are really of no concern to the Government because the whole thing had been handled with Mr. Halton. And this is just after acquired knowledge on our part that there was some independent agreement

between them. But we believe when the evidence is in, your Honor, that those issues will be made clear to you.

The Court: What was the second issue? I want to get it clear. The first one was that Halton had voluntarily agreed to pay if no restraint was—

Mr. Blackstone: Yes. And secondly, even apart from that, Halton Tractor realizes—I think it appears from the answers to the interrogatories—that the sale price that they sold this equipment for exceeded the indebtedness to [21] them from Watson by \$17,545.76. That appears in their answers to written interrogatories. The total tax that Watson owed that was paid by Halton Tractor was nine thousand some odd dollars. So that in effect they came out with something like \$7,000 excess over and beyond their indebtedness from Lloyd Watson. So we think clearly that is an issue.

But we have, in other words, two strings to our bow. We think if the first issue is decided as we think it should be, in light of what the evidence will be, that there was a perfectly clear agreement to discharge the tax liability of Lloyd Watson, and whether or not that turned out to be a losing proposition wouldn't make any difference. But we say further going beyond that that the actual facts show that they came out ahead on the transaction.

The Court: Well, Mr. Blackstone, do I take it it's your position here that as to the conditional sales contract or as to the chattel mortgage there was no determination of such as repossession under

the respective contracts so as to cut off the equitable interests of Mr. Watson?

Mr. Blackstone: No, your Honor, that had not been done. I think Mr. Sharff has conceded that at that time that this conversation occurred between Mr. Reilly and Mr. Watson we would have to concede. And I think our answer is that the legal title under the conditional sales agreement, the legal title was in Halton Tractor. And we now discover part of the [22] equipment, the legal title, was in Wes Durston's. But they had not exercised their right of repossession. They had not cut off the equitable interest of Lloyd Watson. And I think that background helps explain the arrangement that was made between Mr. Reilly and Mr. Halton about how these taxes would be paid and who would sell the equipment.

The Court: All right, proceed.

Mr. Sharff: Is it permissible to remain at the table while we go on, your Honor?

The Court: Yes.

Mr. Sharff: Mr. Halton, please.

EDWARD H. HALTON

a plaintiff herein, was called in his own behalf;
sworn.

The Clerk: State your full name for the Court
and record.

The Witness: Edward H. Halton.

Direct Examination

By Mr. Sharff:

Q. Where do you reside, Mr. Halton?

A. In Merced, California.

Q. What is your occupation?

A. I am the president of the Halton Tractor
Company, a California corporation.

Q. What is the nature and type of their business, Mr. Halton?

A. We are the distributors for the Caterpillar
Tractor Company and the John Deere Plow Company and other allied lines. [23]

Q. Do you handle both new and second-hand
equipment? A. Yes, we do.

Q. Where are your places of business?

A. Our principal place of business is in Merced.
We have a store at Los Banos and a store at Chowchilla.

Q. As part of that business, did you have also
a repair shop which you do repair work for the
general public?

A. Yes, repair shop and repair parts.

Q. All right. Now do you know one Lloyd
Watson?

(Testimony of Edward H. Halton.)

A. Yes. We have done business with Lloyd Watson for a number of years.

Q. And had you known him for a couple of years, known him prior to 1947? A. Yes.

Q. All right. Now what was Mr. Watson's business?

A. Mr. Watson was first a land-leveling contractor and later became a bonded licensed contractor.

The Court: When you say a licensed contractor, you mean general contractor?

A. General contractor, yes, sir.

Q. (By Mr. Sharff): Now, Mr. Halton, in April of 1947 did you have a transaction with Mr. Watson, Mr. Lloyd Watson, concerning certain equipment?

A. Yes. We entered into a conditional sales contract to sell Mr. Watson two Caterpillar D-W 10 tractors and scrapers, [24] both were second hand.

The Court: When was that?

A. In April of 1947.

The Court: All right.

Q. (By Mr. Sharff): I ask you if this is a true copy of the conditional sales contract, Mr. Halton?

A. Yes, it is.

Q. Can you identify the signatures thereon?

A. Yes. This is mine, E. H. Halton, here (indicating).

Q. Signing on behalf of the Halton Tractor Company? A. Yes.

Q. And what is the other signature on the line,

(Testimony of Edward H. Halton.)

“Purchaser”? A. Lloyd Watson, Purchaser.

Mr. Sharff: Very well. Does your Honor wish to inspect this document?

The Court: Yes, I do. All right. Mr. Clerk, would you hand this to Mr. Sharff?

Mr. Sharff: We will ask that this be received as Plaintiff's first in order.

The Court: It will be admitted into evidence as Plaintiff's Exhibit 1.

(Whereupon document referred to above, copy of purchase agreement, was received in evidence and marked Plaintiff's Exhibit No. 1.)

Q. (By Mr. Sharff): Mr. Halton, some time later in the year [25] 1947, did you have another transaction with Mr. Watson? A. Yes.

Q. Did you have one concerning a Morris Plan mortgage? A. Yes.

Q. Will you tell us how that transaction was initiated?

A. Yes. Mr. Watson came over to our place of business at Merced and——

Q. Can you fix the approximate time or date of this conversation?

A. In September of 1947, sometime. I cannot tell you the exact date.

Q. All right. And who was present during your conversation, Mr. Halton?

A. Mr. Watson and I were in my office, at our office at Merced.

Q. And will you tell us now the conversation

(Testimony of Edward H. Halton.)

you had with Mr. Watson with reference to the Morris Plan mortgage?

Mr. Blackstone: I will object as calling for hearsay. I don't understand the purpose of that.

The Court: Overrule the objection.

Q. (By Mr. Sharff): Go ahead.

A. Mr. Watson told me, he said that he was delinquent in his payments to the Morris Plan.

The Court: I do that for the reason that you rely upon—you have to rely upon the equity of Mr. Watson, and in [26] effect he is your predecessor in interest in any property rights that the Government has. Therefore these conversations between him and Mr. Halton are material and are not hearsay.

Mr. Blackstone: Yes.

Q. (By Mr. Sharff): That was the basis on which I submitted them, being their predecessor in title.

The Court: You may then proceed.

The Witness: Mr. Watson, as I have said, told me that he was delinquent to the Morris Plan and that the Morris Plan had threatened to foreclose him; and that he had just entered into a job with some people by the name of Erreca, who live in Los Banos and have a very large ranch there, and which job he told me would enable him to pay out the balance due under the mortgage. But they at the time was out of cash, out of funds, and would I help him out by financing or buying the Morris Plan mortgage and entering into another deal with

(Testimony of Edward H. Halton.)

him whereby the payments would be over a longer period of time and in smaller amounts at a time so that he would be able to complete the purchase of this equipment that he was—that he had the loan on from the Morris Plan. This I agreed to do, and——

Q. Now having agreed to do that, Mr. Halton, did you get in touch with the Morris Plan?

A. Yes. [27]

Q. How did you communicate with them?

A. I phoned to the Morris Plan and we made an arrangement with the Morris Plan that they would send their mortgage to the Bank of America, Merced branch, which is the bank that we do business with, and that I would put up the amount of the mortgage with our bank and the bank would handle the exchange of our money to them and the mortgage to us. And this we did.

Q. Can you tell us about when that was done, Mr. Halton?

A. Did you say where and when?

Q. When?

A. Yes. This was done right away shortly after our conversation with Watson.

Mr. Sharff: Mr. Blackstone, do you recall that a date fixed by the Morris Plan was about September 29th in the deposition? If you do, I would ask for a stipulation from you in that regard.

I presume the Court would like the approximate date with a little more certainty?

The Court: Certainly, if you can agree upon the

(Testimony of Edward H. Halton.)

date of the assignment of the Morris Plan mortgage to Halton.

Mr. Sharff: Transfer, your Honor. There was no principal assignment, your Honor.

The Court: All right. Well, whatever transfer there was. [28]

Mr. Sharff: Yes.

The Court: All I am interested in is when it took place, if there was——

Mr. Blackstone: I want to preserve my position, your Honor, insofar as there is testimony here as to an oral assignment. At this point I haven't researched whether or not a mortgage had been assigned, verbally or not. I am not sure, but if there is, I do preserve the position of the Government. I will object to the testimony of an oral assignment. And in the absence of any written assignment, I would ask testimony in that regard be stricken.

The Witness: Well, I paid \$25,900.

The Court: Just a moment, Mr. Halton. I am trying to get what you are trying to stipulate—what you are asking for a stipulation to.

Mr. Sharff: I am asking for a stipulation for the date that the Halton Tractor Company paid the money to the Morris Plan was about September 29th, 1947.

The Court: That is another thing. Without any stipulating as to—without naming any stipulation as to what the legal effect of that was, just that the fact that Mr. Halton paid through his bank to the

(Testimony of Edward H. Halton.)

Morris Plan the amount of money mentioned by Mr. Sharff on the particular date——

Mr. Blackstone: There was a statement made at the deposition of Mr. E. E. McIntyre, credit manager of Morris [29] Plan Company, that the records of the company in his possession carried a notation of September 29th, 1947, currently as the date that certain documents relating to that chattel mortgage were delivered to the Bank of America. So I would stipulate.

The Court: And the money was paid by the Bank of America for Mr. Halton to the Morris Plan?

Mr. Blackstone: Yes, I would stipulate to that.

The Court: And how much was the amount of money?

Mr. Sharff: \$25,930, your Honor. We can produce the original check if it is desired, but the stipulation——

The Court: Will you stipulate that that amount of money was paid, \$25,930?

Mr. Blackstone: That amount was paid by Mr. Halton——

Mr. Sharff: From the Halton Tractor Company to the Morris Plan. I also have a letter setting that forth.

Mr. Blackstone: I will stipulate to that.

The Court: That is subject to confirmation. If there are any problems on it, why, I will permit you to move to withdraw from the stipulation if

(Testimony of Edward H. Halton.)

date of the assignment of the Morris Plan mortgage to Halton.

Mr. Sharff: Transfer, your Honor. There was no principal assignment, your Honor.

The Court: All right. Well, whatever transfer there was. [28]

Mr. Sharff: Yes.

The Court: All I am interested in is when it took place, if there was——

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The Court: And the money was paid by the Bank of America for Mr. Halton to the Morris Plan?

Mr. Blackstone: Yes, I would stipulate to that.

The Court: And how much was the amount of money?

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Mr. Blackstone: I will stipulate to that.

The Court: That is subject to confirmation. If there are any problems on it, why, I will permit you to move to withdraw from the stipulation if

(Testimony of Edward H. Halton.)

further proof is needed and that will be stipulated to then?

Q. (By Mr. Sharff): Mr. Halton, I think you told us you received the original mortgage then from the Morris Plan?

The Court: Now then, you have made an objection as to any oral assignment. I will overrule the objection at this [30] time without prejudice to your right to move to strike in the event that you have any further legal objections to make. I want to hear the transaction. Will you proceed?

The Witness: What was the question?

Mr. Sharff: Will you repeat the question, Miss Reporter?

(Record read.)

The Witness: Yes, that is correct. We received—our bank received the original mortgage from the Morris Plan and handed it to us.

Q. (By Mr. Sharff): In preparation for this trial, Mr. Halton, did you, and did you have a search made for that original mortgage?

A. Yes. We have searched diligently through our records. But somewhere or another we have mislaid the mortgage and could not produce it for this trial.

Mr. Blackstone: That is certified by the County Recorder?

Mr. Sharff: By the County Recorder, yes.

May I erase some notes I made here in pencil (showing document to Mr. Blackstone) prior to the time I put them in evidence?

(Testimony of Edward H. Halton.)

The Court: Either that, or we will ignore them.

Mr. Sharff: I might not be able to read them, you Honor, I might say facetiously.

The Court: All right. Plaintiff's Exhibit [31-32] 2, a certified copy of the mortgage.

Mr. Sharff: Yes. A certified copy of the Morris Plan mortgage dated the 24th of March, 1947, the mortgagor here being Lloyd Watson, the mortgage being with the Morris Plan Company of San Francisco. I ask that it be received as Plaintiff's next in order.

The Court: It will be admitted into evidence as Plaintiff's Exhibit 2.

(Whereupon the chattel mortgage referred to above was received in evidence and marked Plaintiff's Exhibit No. 2.)

Q. (By Mr. Sharff): Mr. Halton, did you ever release that mortgage? A. No, sir.

Q. Did you ever deliver it to Mr. Lloyd Watson?

A. No, sir.

Q. At the time you made this transaction, Mr. Halton, did you or anyone connected with the Halton Tractor Company know that Mr. Lloyd Watson owed any taxes to the United States Government? A. No, sir, I did not.

Q. Now some time in December, 1947, did Mr. Lloyd Watson come to see you?

A. Yes. In the first week of December of 1947 Mr. Watson came again to Merced. And in my office where he and I only—— [33]

(Testimony of Edward H. Halton.)

Q. Pardon me, just a moment now. Fixing that date in December, Mr. Halton, up to this time had Mr. Francis J. Reilly called upon you in regard to any taxes owing by Mr. Watson?

A. No, sir; no, sir.

Q. How do you fix the time of the year, Mr. Halton, other than just by your recollection?

A. Well, it was winter and it had been raining a good deal; and that is one of the reasons which entered into our conversation with Watson, that I know it was about that time.

Q. Was it getting close to the end of the year?

A. Right.

Q. And what was the condition of the payments under the conditional sales agreement in the chattel mortgage, had they been kept up to date?

A. No. Mr. Watson was behind with us in his payments on this equipment.

Q. In other words, this was a meeting to determine what Mr. Watson was going to do about these indebtednesses, is that correct? A. Right.

Q. All right. I presume that only you and Mr. Watson were present? A. Correct.

Q. Will you tell us what the conversation was between you [34] and Mr. Watson was at that time and place?

A. Yes. Mr. Watson told me that he was very discouraged for the reason that he was unable to make any money with this type of rubber-tired tractors and scrapers, and that he felt that he couldn't make a go of his payments to us, and that he

(Testimony of Edward H. Halton.)

wouldn't be able to come out with this equipment, and that the fact that it was rather old and needed lots of repairs. He asked me what he should do. We listed up his equipment that he had, all of it. We came to the conclusion that we could sell his equipment after repairing it and putting it up in shape for sale, that we could repair it and sell it and he would have an equity in the equipment.

And I agreed to do this for him, of course, deducting our costs of doing it. But I agreed to do it. And with the equity left over I agreed to give him a credit on our books for the purchase of either new or good, excellent equipment for the reason that he had been a successful contractor when he operated one tractor and scraper when he did a lot of the work himself, actually, and had been very successful, had made a lot of money at it.

And then when he tried to get big in this business, he lost his shirt and was losing money fast at that time. So we agreed to do these things for him. He agreed in turn to bring all of his equipment and place it on our lot at Los Banos, which was the nearest to his job. [35]

Q. Well now, Mr. Halton, allow me to interrupt you there, please. At the time that you and Mr. Watson had this conversation, did Mr. Watson say anything to you about owing the United States Government taxes? A. No, he did not.

Q. Did you know anything about it?

A. No, sir.

Q. Now let us go back over this again. Now tell

(Testimony of Edward H. Halton.)

us just what or how, rather, the money was to be applied after—withdraw that.

First of all, I understood you were to repair the equipment after it was brought in?

A. Right.

Q. All right. Now in what manner was it to be sold, at an auction or——

A. No. It was our intention to bring the money in, as I agreed with Watson.

Q. You mean equipment, not money?

A. Bring equipment in. I am sorry.

The Court: Bring the equipment in and repair it?

A. Paint it, put new seat covers on it, straighten up the tin work, and otherwise put it in good running order so that we could list it with our regular list of used equipment and that we could sell it in an orderly manner to obtain a good price for [36] Watson.

Q. (By Mr. Sharff): All right. Now will you tell us what your conversation was with Mr. Watson as to how the proceeds were to be applied resulting from the sale of this equipment in the usual course of your business?

A. Yes. I told him that we would put the equipment through our shop, *but* in the repairs and labor, new parts where necessary, and put the equipment in good condition for sale. Then we would list the equipment with our regular used tractor list, and that our salesmen then would sell them, and from the proceeds of the sale—we would deduct first, of

(Testimony of Edward H. Halton.)

course, the money he owed to us plus the cost of repair, labor, and parts, and the cost of selling as we pay our salesmen on a commission basis and we have other costs of selling, advertising, and so on—and from that we would give him a credit on our books.

Q. Now did Mr. Watson bring in the equipment, just yes or no? A. Yes.

Q. And to what place of business of yours did he bring it? A. To our store at Los Banos.

Q. Can you tell us over what period of time he brought it in, sir?

A. Well, it was over an extended period of time for the reason that he had not quite completed—he had two or three more days' work to do on the job that he was on. And either [37] because of rain or something, anyway, all of the equipment did not get there until January. In fact, we had to go into Northern California to get one of the pieces of equipment which would not operate. The motor was broken; it was dead. We had to put that on our truck and haul it into Los Banos. So all of the equipment did not get into Los Banos until some time in the middle of January.

Q. Now by this same date, the middle of January, Mr. Halton, was any equipment of Mr. Watson's not covered by your conditional sales agreement and not covered by your mortgage also put on your lot by Mr. Watson?

A. Yes. Mr. Watson put four D-W Caterpillar, D-W 10's, and scrapers belonging to Mr. Wes Dur-

(Testimony of Edward H. Halton.)

ston on our lot along with the equipment that we had covered.

Q. Now tell me this, also, besides the property covered by your chattel mortgage and conditional sales contract, did Mr. Watson also bring in other equipment he owned which was not Mr. Durston's also?

A. Yes. He brought in a touring car and a pickup and brought those in with the pink slips of the cars and brought them in to us also.

Q. I presume there will be no objection to any leading questions on that.

Did he also bring in a Southwest Rooter?

A. Yes, he brought in a Southwest Rooter. [38]

Q. And four diesel fuel tanks?

A. Yes, on wheels. A little wagon brought them in, too.

Q. All right. Now can you tell us approximately when Mr. Francis J. Reilly came to see you the first time?

A. Mr. Reilly came to see me in the latter part of January of 1948.

Q. And where did you see him?

A. He came in to my office at Merced.

Q. Now when he came in to see you, what did he say to you?

A. Mr. Reilly told me that he had been over to Los Banos and had been to see Mr. Watson and had seen our equipment, Mr. Watson's equipment being brought into our store, into the lot there at Los Banos.

(Testimony of Edward H. Halton.)

Q. All right. Now tell me, did you know Mr. Reilly?

A. Yes, we knew Mr. Reilly very well. He lived in Merced and we have done and still do a considerable amount of business with Mrs. Kirby, who is Mr. Reilly's sister, I believe.

Q. Now did Mr. Reilly say something to you on the subject of taxes being owed by Mr. Lloyd Watson?

A. Yes. He pointed out to me that Mr. Watson had not paid social security taxes, I believe they were, and that the Government had filed a lien, or at least had filed something in the County Recording Office against Watson for the recovery of the taxes. I was very surprised at this. [39]

Q. That was the first time you had heard about any taxes owing by Mr. Watson, is that correct?

A. Yes, sir; yes, sir.

Q. What did you say about that?

A. Well, I was anxious to find out about the taxes and I made inquiries into the court house to actually——

Q. Please let's not go to that yet, Mr. Halton. What did you say to Mr. Reilly, if anything, when he told you that Lloyd Watson owed taxes and that it had a lien?

A. Oh, I objected to paying somebody else's taxes. I told Mr. Reilly that this—that I didn't want to pay taxes for somebody else and that we had a conditional sales contract and a mortgage on this equipment and we thought we were protected

(Testimony of Edward H. Halton.)

that way. But Mr. Reilly told me that they were not because he said the government lien was prior to those things, that the indebtedness for these taxes, the social security taxes, had been incurred on this equipment of Watson's and that the Government had a right to seize this equipment belonging to Watson.

Q. Did Mr. Reilly make any statement of what the United States Government would do in regard to this equipment if you did not pay the taxes, Mr. Halton?

A. Yes. He told me that he had the right to seize it and sell it at a forced sale. And I pointed out to Mr. [40] Reilly that if they sold that equipment in the condition that it was then in, that in a forced sale that he wouldn't recover possibly more than a quarter of the value of the equipment.

Q. All right. At that date and at that time did Mr. Reilly tell you how much was owing in the amount of taxes?

A. I asked him that question and he did not know the amount of money owing on the taxes except that he told me he thought it was between \$7,500 and \$8,000, but that he didn't have all the figures together.

Q. All right. You have given us now the substance of your conversation, the first visit from Mr. Reilly, I believe, haven't you?

A. Right.

Mr. Sharff: I don't know your Honor's rule about recesses.

(Testimony of Edward H. Halton.)

The Court: Well, I am about ready to take one if you have come to a convenient place.

Mr. Sharff: I have come to a convenient place, your Honor, yes.

The Court: All right, just as soon as I can make these notes we will take the recess. All right, we will be at recess.

(Recess.) [41]

Afternoon Session—March 9, 1955, 2 P.M.

Q. (By Mr. Sharff): After Mr. Reilly left, Mr. Halton, did you make any investigation to see if the United States Government had filed a lien?

A. Yes, I did. I went up to the court house—to the Recorder's Office at the court house, and saw that they had filed this document against Mr. Lloyd Watson.

Q. Now tell me this, you told us that Mr. Reilly did not know the amount of the taxes when he saw you on the first occasion. Did you make any effort to ascertain the amount of taxes that he did owe?

A. Yes. Several days later I went into their office, the Internal Revenue office in Merced, and Mr.——

Q. Whom did you see there?

A. Mr. Reilly was not in and I talked with Mr. Crisa.

Q. Who is Mr. Crisa?

A. Mr. Crisa was in charge of that office at that time.

(Testimony of Edward H. Halton.)

Q. Was he known to you?

A. Yes. Mr. Crisa and I had served on a vestry in our church together. I had known him for a number of years. And so we discussed this situation. I asked Mr. Crisa if he had the amount of money yet that was due to the Government by Watson. And Mr. Crisa said he didn't know anything about the amount of money, that Mr. Reilly was handling the matter [42] completely and that—and I asked him if in his opinion I had to pay for it, pay this lien for Watson. And he told—he substantiated what Mr. Reilly had previously said, that I did have to pay it.

Q. Did you mention the matter of your chattel mortgage and conditional sale to Mr. Crisa?

A. I do not recall that I spoke of that chattel mortgage at the time, no.

The Court: How is Crisa spelled?

A. C-r-i-s-a. Connie, as far as I am concerned.

Q. (By Mr. Sharff): Now there was another time when you saw Mr. Reilly when the two of you went to Los Banos, wasn't there? A. Yes.

Q. Now was that the next time Mr. Reilly saw you or was that the third time?

A. That was the next time that he saw me.

Q. All right.

A. And we talked on the telephone and made an appointment for the following day. Mr. Reilly came to our store on 16th Street in Merced and I took him in my automobile over to Los Banos, at which time he affixed a piece of paper which began,

(Testimony of Edward H. Halton.)

“The property of the United States Government.” I don’t know what you would call it. But he placed these things onto the D-W 10’s and scrapers, which were at that time on [43] our lot.

Q. All right. Now let’s stop right there. You say D-W 10’s and scrapers? A. Yes.

Q. How many were covered by the Morris Plan mortgage and by the conditional sales agreement as of that date, sir?

A. There were two D-W 10’s covered by the conditional sales agreement and there were four D-W 10s covered by the mortgage.

Q. And to whom did the other two D-W 10’s belong?

A. They belonged to Mr. Wes Durston. However, he put the papers on all of them.

Q. You have mentioned previously a touring car, I believe, and a pickup truck. A. Right.

Q. That Mr. Watson brought to your place at Los Banos. A. Right.

Q. Was that on the lot at Los Banos?

A. No, sir.

Q. It was not?

A. No, sir. They were—we had taken those two vehicles and delivered them to the McAuley Motor Company, the company from whom we buy principally our own cars and equipment and—

Q. Now when you were at Los Banos there, did you have some conversation with Mr. Reilly about the two cars or [44] automobiles?

A. Yes. I explained to Mr. Reilly where these

(Testimony of Edward H. Halton.)

cars were and that we had made an arrangement for Mr. McAuley to sell these automobiles.

Q. What did he say then?

A. And he told me that they were covered—that they would be attached just the same as the tractors and scrapers were attached, that they were under the same seizure arrangement and that—and I pointed out to him that in all probability that sale of these machines would probably be consummated or at least would be consummated very shortly, and that I was sure that with our connections that we could get as much money out of them as possible for anyone to get. And I told Mr. Reilly that we would just take the McAuley check that we got from the sale of these cars and deliver it to him. And he told me, well, that being the case, then the Government wouldn't seize them and that they would go ahead and let McAuley sell them; and that if I would agree to hand the proceeds over to the Government when it was paid to us, which I agreed to do and which we did, it was \$2200.

Q. How much?

A. \$2200 that we received for the machines. And we paid that. We gave that check to Mr. Reilly.

Q. I show you your check No. 4718 of the Halton Tractor Company in the amount of \$2200 drawn on the Bank of America [45] at Merced payable to the Collector of Internal Revenue, and ask you if that is the check you just referred to?

A. Yes, \$2200.

Mr. Sharff: I ask that that be received as Plain-

(Testimony of Edward H. Halton.)

tiff's next in order. The date, your Honor, is February 5th, 1948.

The Court: All right. It will be admitted into evidence as Plaintiff's Exhibit 3.

(Whereupon check for \$2200 referred to above was received in evidence and marked Plaintiff's Exhibit No. 3.)

Q. (By Mr. Sharff): After this conversation at Los Banos did you and Mr. Reilly then return to Merced? A. Yes.

Q. In your car?

A. I took him back to Merced.

Q. On that trip did you have any further discussion about the situation with Mr. Reilly?

A. Yes, I did.

Q. Will you tell us what you said and what Mr. Reilly said?

A. I said to Mr. Reilly, I said that here we were paying taxes for somebody else and we weren't even getting a hearing or a trial of any kind. And he told me that we—our procedure would be to pay the taxes and then we could get—we could protest the payment and get a hearing before the Internal Revenue Department to recover the taxes—to recover [46] this money that we were paying for Watson. And I told him that was a fine high-handed way to do. It was practically a Gestapo method. And Mr. Reilly said no, that we could get—we would have a hearing if we protested it.

Q. Mr. Halton, what papers if any were ever

(Testimony of Edward H. Halton.)

served upon you or delivered to you by Mr. Reilly?

A. Well, it was not until after we had given Mr. Reilly the \$2200 check that Mr. Reilly ever presented us with the exact amount of money that was owing to the Government. And he brought a yellow sheet of paper into our office and handed it—I was out at the time—he handed it to our bookkeeper.

Q. I show you a document, a yellow paper here. I ask you if this is the document that was left at your office by Mr. Reilly?

A. Yes, sir, that is the one.

Q. Did you ever receive—I am sorry. Just one moment.

Mr. Sharff: I will offer that in evidence at this time.

The Court: Plaintiff's Exhibit 4.

Mr. Sharff: Would your Honor wish to inspect it?

The Court: It's the same as the exhibit that is attached, is it?

Mr. Sharff: It's the same as the one attached to the complaint, your Honor, yes.

The Court: All right. I don't care to look at it now. [47]

(Whereupon document entitled "Lloyd Watson Analysis of Taxes," referred to above, was received in evidence and marked Plaintiff's Exhibit No. 4.)

(Testimony of Edward H. Halton.)

Q. (By Mr. Sharff): Other than the document just received in evidence——

The Court: When was this turned over?

Q. (By Mr. Sharff): About when did you receive this, Mr.——

A. During the first part of February.

Q. Yes?

A. Probably it was some time after we had handed—it was a few days after we had handed Mr. Reilly the check dated February 5th.

Mr. Sharff: In fact, your Honor, it shows the rest of the \$2200 here right on it.

The Witness: It is not dated.

Q. (By Mr. Sharff): But I said, Mr. Halton, that the payment for \$2200 is shown on this.

A. Right. But we received that after that and it is not dated.

Q. Mr. Halton, other than the document just received in evidence as Plaintiff's Exhibit 4, were any other papers ever served upon you or the Halton Tractor Company? A. No, sir.

Q. Now did you on or about during the period we have just [48] been discussing communicate with Wes Durston? A. Yes. I called——

Q. And you called him on the phone, did you?

A. I called him on the telephone.

Q. Where did you reach him, sir?

A. I got him at his place of business in Los Angeles.

Mr. Blackstone: May I interrupt? I didn't get the date of that.

(Testimony of Edward H. Halton.)

Mr. Sharff: I said during this same period.

Mr. Blackstone: Can that be fixed?

Q. (By Mr. Sharff): Can you fix the date any more exactly, Mr. Halton?

A. Yes. It was the day after I had been to Los Banos with Mr. Reilly.

Q. And what is your recollection as to when you were with Mr. Reilly—may I withdraw that?

A. That I talked this matter over with Mr. Durston prior to the actual placing of the stickers. I advised him of Mr. Reilly's conversations with me. But then I called him and after February—after the last day of January, or the latter one or two days after January when the stickers were placed on the tractor——

Q. You mean in February they were——

A. In February.

Q. Yes? [49]

A. And I called him on the telephone the following day after I had gotten back with Mr. Reilly. I told him that the stickers were on his machines, as well as ours, and that the total amount of money we thought was going to be around \$8,000. We still at that time did not know what the amount of money was.

Mr. Sharff: Your Honor, I am offering this as verbal acts which I think are admissible in this situation.

The Court: Well, there has been no objection, so proceed.

Mr. Scharff: Very well.

(Testimony of Edward H. Halton.)

Q. Continue with your conversation with Mr. Durston.

A. And after we were served this yellow foolscap paper to give us the exact amount of money that was involved then I called Mr. Durston again and told him, that I discussed with him the total amount of equipment that he had and what I thought should be his fair share of the bill involved.

Q. You have just referred, I believe, when you said a yellow foolscap, to Plaintiff's Exhibit No. 4, is that correct?

A. Yes, sir, that is what I mean.

Q. Well, in your conversation with Mr. Durston, did you say anything about or anything on the subject of his conditional sales contract, or did he say anything about it?

A. He told me that the Government couldn't do that, that it [50] was on a conditional sales contract. And I told him of our conversations that I had had with Mr. Reilly, and that the Government had put these papers on the machines; and that if we didn't pay the Government off, that the Government was going to have a forced sale and sell them and we would be left out in the cold.

So Mr. Durston agreed and I agreed on the amount of money which would be his fair share of the total. And he agreed to send me a check at a later date. He said he couldn't send it right then, but at a later date for \$3900, which he did. He sent me a check.

Q. I show you a check of Wes Durston, Inc.,

(Testimony of Edward H. Halton.)

dated June 30th, 1948, payable to the Halton Tractor Company, for the amount of \$3900. I ask you if that is the check which you received, the \$3900 you have just mentioned, Mr. Halton?

A. Yes, sir, that is the check.

Mr. Sharff: I ask that this be received in evidence as Plaintiff's next in order.

The Court: It will be received in evidence as Plaintiff's Exhibit 5.

(Whereupon check of \$3900, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 5.)

Q. (By Mr. Sharff): After that, did you pay a further amount to the United States [51] Government?

A. Yes, sir. Then I paid the difference, the balance which is due on the bill the Government had given me, which we call No. 4.

Q. I show you a check of the Halton Tractor Company dated February 16th, 1948, bearing No. 5022, payable to the Collector of Internal Revenue, for the amount of \$7,777.97. I ask you if this is the check by which you paid the balance of taxes to the United States Government?

A. Yes, sir, that is the balance.

Mr. Sharff: I ask that this be received in evidence as Plaintiff's next in order.

The Court: It will be Plaintiff's 6.

(Whereupon check of \$7,777.97, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 6.)

(Testimony of Edward H. Halton.)

Q. (By Mr. Sharff): Mr. Halton, when you paid this money by these two checks to the United States Government, did you expect the Government to keep the money finally?

Mr. Blackstone: I object to that question, your Honor. I think it's completely irrelevant, asking for the opinion and conclusion of the witness.

The Court: Yes, I think I have to sustain that.

Mr. Sharff: Very well, your Honor.

Q. What was your state of mind, Mr. Halton, when you paid these checks? [52]

Mr. Blackstone: I object to that, your Honor. That is completely irrelevant and hasn't anything to do with the issues in this case.

Q. (By Mr. Sharff): Why did you pay this money, then, to the United States Government, Mr. Halton?

A. Because I was told that is the way I had to do.

Q. And what were you told the alternative was if you didn't pay it?

A. I was told that the goods would be seized and sold at a forced sale. And I knew this equipment wouldn't bring hardly anything on a forced sale because some of the equipment wouldn't even run.

Q. Well, now, this equipment was on your property there at Los Banos. Did your company do anything in regard to it, repairing it and such?

A. Yes. After we had—we didn't touch it until we had paid that last check. And then when we had paid the last check we went ahead and we repaired,

(Testimony of Edward H. Halton.)

as I agreed with Watson, we went ahead and repaired the equipment, put it up in good running condition. And then when we sold it, over quite a long period of time—the last pieces were—the last of the pieces were sold, my recollection, a year later. But we recovered our money out of it.

Q. Assuming, Mr. Halton, that this equipment after being repaired and being exposed on the market for approximately a [53] year, was sold for the sum of \$57,000, are you able to tell us approximately what amount that equipment would have brought if it had been sold in the condition it was in when brought to you by Mr. Watson?

Mr. Blackstone: I object to that as asking for the purely speculative opinion, your Honor. I don't see that it has any bearing on this case.

The Court: What you are really asking him is, what it would have brought it in the condition that it was when the Government put its notices on there?

Mr. Sharff: That's right, sir.

The Court: Well, he is a qualified man on values on this kind of equipment. I will overrule the objection. What would it have brought at that time?

The Witness: I doubt very much, your Honor, if it would have brought the amount of money we paid to the Government, the ninety-eight hundred or ninety-nine hundred dollars.

The Court: That is all of the equipment, including Durston's?

A. No, sir, not including Durston's. I am talk-

(Testimony of Edward H. Halton.)

ing about—well, even including Durston's, some of it wouldn't run, either.

Q. Well, from what your knowledge of the equipment—I suppose you had better segregate it first as to the equipment you claimed an interest in. How much would it have brought [54] on the market without being repaired or reconditioned?

A. If we had had a forced sale, an auction sale there on the property, I do not believe our equipment—that the equipment there would have averaged more than fifteen hundred—eighteen hundred dollars per unit.

The Court: How many units were there?

A. Ten in total; six belonged to me and four belonged to——

Q. Well then, that would be, you say, \$1800 a unit?

A. Yes, sir. I can further say that a year or two later, not right at that time, but a year or two later I bought the same piece of equipment for one unit from M. J. Rudy in Modesto for \$1500.

Q. (By Mr. Sharff): Were the market conditions in 1948 similar to those a year later?

A. Yes, sir, approximately.

Q. All right. In your opinion, Mr. Halton, was this equipment sold at the highest and best price obtainable on the market at that time?

A. Yes. I thought we were very fortunate in our sales.

Q. Now, you don't know of your own knowledge the balance that was due from Mr. Watson to Hal-

(Testimony of Edward H. Halton.)

ton Tractor Company on the mortgage and the conditional sales contract as of January 31st, 1948, do you? A. No, I couldn't say that here.

Q. That would be better for your bookkeeper to testify to? [55] A. Yes.

Q. And who is your bookkeeper, sir?

A. Mr. Frank Bostick.

Q. He is in the courtroom here?

A. Yes; that is Mr. Bostick there (indicating).

Cross-Examination

By Mr. Blackstone:

Q. Mr. Halton, you have testified that you purchased a Morris Plan chattel mortgage, which is Plaintiff's Exhibit 2, and that you have failed to locate the original copy of that mortgage.

A. That is right.

Q. I would like to have you examine this certified copy of a mortgage of chattels—which before looking at I would like to have it marked Defendant's Exhibit A for identification.

The Court: For identification it will be marked Defendant's Exhibit A.

(Whereupon photostatic copy of chattel mortgage was marked Defendant's Exhibit A for identification.)

Q. (By Mr. Blackstone): Would you look at that, Mr. Halton, and tell us if you recall the execution of that chattel mortgage by Lloyd [56] Watson?

(Testimony of Edward H. Halton.)

Q. Would you look at that, Mr. Halton, and tell us if you recall the execution of that chattel mortgage by Lloyd Watson? A. Yes.

Q. Did you accept that chattel mortgage from Lloyd Watson? A. Yes.

Q. It bears the date October 2nd, 1947. Is that the date on which the mortgage was executed and delivered to you? A. Yes.

Mr. Sharff: Your Honor, I would like the record to note my objection at this time.

The Court: Well, make it.

Mr. Sharff: That it is incompetent, irrelevant and immaterial. The second mortgage under the decision of the United States courts that even if a third party discharges—pays off the mortgage of the taxpayer, nevertheless there is equitable subrogation even though they release it. Therefore it is incompetent, irrelevant and immaterial, and I submit authorities on that point, your Honor. Even though the man paying off the mortgage advances further monies and takes a new mortgage discharging the first one, he is still protected to the amount paid by the first mortgage. If your Honor desires authorities on it, I can do it, I can make any objections for the record if your Honor wishes to hear the evidence nevertheless. [57]

The Court: I will reserve ruling on that objection. I do want your authorities because I presume you take the position that this is some sort of either a merger or an innovation or a new—

(Testimony of Edward H. Halton.)

Mr. Blackstone: Yes, your Honor; at least that is what I am trying to find out.

The Court: I will permit the testimony to go in subject to the objection, and reserve ruling on it.

Q. (By Mr. Blackstone): Can you state, Mr. Halton, what this mortgage was intended to secure, what indebtedness from Watson was this chattel mortgage—I have shown you Defendant's Exhibit A for identification—what debt was that intended to secure? A. You say, "Will I state"?

Q. Can you state. A. Surely.

Q. Well, can you tell us what it is?

A. Yes. That mortgage was to outline the method of payment and to cover certain items which were not under the Morris Plan mortgage.

Q. May I have Plaintiff's Exhibit 2? I hand you Plaintiff's Exhibit 2 and Defendant's Exhibit A for identification and I would ask you to state which items of equipment covered by Plaintiff's Exhibit 2 are included in Defendant's Exhibit A for identification? [58]

Q. (By Mr. Sharff): Mr. Halton, would you rather work from the original? It would be easier for you to read, I think. You may keep that one, Mr. Blackstone.

The Witness: Now, what would you like me to do?

Q. (By Mr. Blackstone): I would like to have you state which items of equipment covered by the Morris Plan chattel mortgage are also covered by the mortgage marked Defendant's Exhibit A for

(Testimony of Edward H. Halton.)

identification. A. On one we have——

The Court: Which one? That would be the second one.

A. Yes, sir.

Q. That is the one between Halton and Watson?

Mr. Sharff: Yes, your Honor.

The Witness: Yes, sir. I am kind of confused here. I don't know what you want me to do.

The Court: He wants to know which equipment is covered in the second chattel mortgage which was not included in the Morris Plan chattel mortgage; is that correct?

Mr. Blackstone: First of all, your Honor, I would like to know and have a matter of record which items of equipment covered by the Morris Plan mortgage are likewise set forth and covered by the second mortgage which is marked for identification Defendant's Exhibit A.

The Witness: Yes. The first difference is that——

The Court: He said he first wants the similarity; he [59] wants the similar ones first.

The Witness: Beginning here?

Q. (By Mr. Blackstone): Yes, please do. Just read them out even though it will take a little time.

Mr. Sharff: No objection to me watching there?

The Court: No.

The Witness: The Morris Plan mortgage listed two D-8 tractors, which are at the top of their equipment. That does not appear on the one that we recorded. The second item of four DW10

(Testimony of Edward H. Halton.)

scrapers are identical in both. The next item is LeTourneau carryall, which is the same in both; a Model SP carryall, which is the same in both; a Woolridge carryall, which is again identical. Then in the Morris Plan mortgage there are two double-drum LeTourneau power control units. They are the things that go on the back of the tractor to operate the carryall and we have one on this second mortgage. The Southwest rooter is identical in both. The automobile—wait a minute; I am getting back to this one here. This dozer is not listed in our mortgage and it was listed in the Morris Plan mortgage. Then that concludes the list of the chattels under the Morris Plan.

Then in addition we show four diesel fuel tanks with wagons. Those were four rubber-tired—four tires and rubber-tired wagons with a large fuel tank, on the back of it there was a rack to put grease cans and pressure guns and odds and [60] ends for greasing tractors.

Q. (By Mr. Blackstone): In other words, and if I may interrupt there, that equipment was not covered by the Morris Plan mortgage?

A. Right. And the two automobiles, the pickup and the touring car were on this October 2nd one.

Q. Now, do I understand correctly, Mr. Halton, that you paid \$25,930, which was stipulated, was paid to the Morris Plan to take over their mortgage? Is that the testimony? A. Yes.

Q. This mortgage, which is Defendant's Exhibit

(Testimony of Edward H. Halton.)

A for identification, you have the original there in front of you? A. Yes.

Q. Was to secure the sum of \$56,000. Can you explain why the sum set forth in this second mortgage is greater than the amount you have stated has been paid to Morris Plan in taking over their mortgage? A. Yes.

Mr. Sharff: I beg your pardon, Mr. Blackstone. It does not cover the amount of \$56,000; it covers the amount of \$28,000.

Mr. Blackstone: I beg your pardon.

Mr. Sharff: The fifty-six merely refers to the total amount of future advances.

Mr. Blackstone: Thank you. I stand [61] corrected.

Mr. Sharff: I didn't mean to be so short on it. You caught me by surprise, \$56,000.

Q. (By Mr. Blackstone): I read from the wrong line. This mortgage, then, that is marked Defendant's Exhibit A for identification was to secure the sum of \$28,000. Is that correct?

A. Yes, sir.

Q. Does that represent, then, the amount that you paid to the Morris Plan?

A. No, sir. The amount that we paid to the Morris Plan is by that check.

The Court: Well, he wants to know, though, if that included the amount that was paid to the Morris Plan?

The Witness: Oh, yes, sir.

Q. (By Mr. Blackstone): Do I understand cor-

(Testimony of Edward H. Halton.)

rectly, then, that from the date that you paid Morris Plan \$25,930 to the date when this second mortgage was executed, additional indebtedness had been incurred by Lloyd Watson to Halton Tractor?

A. Oh, I presume it had.

Q. Have you checked the records of the County Recorder of Merced County in regard to the Morris Plan chattel mortgage? A. Yes, sir.

Q. You have done that yourself?

A. Yes, sir. [62]

Q. Have you found of record any release of that chattel mortgage?

A. Well, the Morris Plan mortgage——

Q. Yes? A. No, we never released it.

Q. I didn't ask you if you released it.

A. It was never released.

Q. I am asking you if you yourself checked the record of the County Recorder to see.

A. Oh, yes, a long time ago, too.

Q. Well, when was the time that you checked the records in that regard?

A. I couldn't state, but it's been five or six years ago.

Q. Yes, I would presume we are talking in terms of 1947 and 1948.

A. But to ask me when I went up and looked at it, I can't tell you.

Q. Let me put it this way: I believe our stipulation was in terms of September 29th, 1947, that you paid this money to the Morris Plan.

A. Right.

(Testimony of Edward H. Halton.)

Mr. Sharff: Yes, your Honor—yes, Mr. Blackstone, that is correct.

Q. (By Mr. Blackstone): Did he check the records of the County Recorder's office on that [63] date? A. No.

Q. Before that day? A. No.

Q. Well, then, after that day?

A. Yes. I checked the records when we started talking with Mr. Jonas about recovering this money, which was only five or six years ago. It was after this whole transaction had transpired under—

Mr. Blackstone: I see. At this time, your Honor—

The Witness: At that time we had the original copy of the Morris Plan.

Mr. Blackstone: At this time, your Honor, I would like to offer in evidence Defendants' Exhibit A heretofore marked for identification.

The Court: Well, subject to your objection, the order which I have already made—

Mr. Sharff: Yes.

The Court: I will admit it into evidence. And, of course, if I rule on the objection, why, then, of course, you can make a motion to strike. In other words, I will deem a motion to strike for the reasons given for the objection as having been made and reserving ruling on the motion to strike. But I will overrule the objection so the matter will go into evidence.

Mr. Sharff: Thank you, your Honor. [64]

(Testimony of Edward H. Halton.)

The Court: And it will be subject to the motion to strike.

(Whereupon Defendant's Exhibit A, heretofore marked for identification, was received in evidence.)

Q. (By Mr. Blackstone): This conversation that you had with Watson when he came and said that he was discouraged about being able to work out his financial problems, can you fix an approximate time of that conversation?

A. Yes, about the first week in December.

Q. And you have stated what that conversation consisted of in which you agreed to repair the equipment and sell it and any excess would be paid to Mr. Watson; is that correct?

A. No, sir. I—I testified that the excess would be given to him as a credit on our books.

Q. For future advances that you would make or——

A. For future purchases that he might make.

Q. For future purchases? A. Yes.

Q. Well, it is true, then, isn't it, that at that time you recognized that given a chance to sell the equipment there would be some equity in the property that would belong to Mr. Watson?

A. Right.

Mr. Sharff: I don't think that is a fair question, your Honor. I object to it as calling for an opinion and [65] conclusion and it is incompetent, irrelevant and immaterial.

(Testimony of Edward H. Halton.)

The Court: Overruled.

Mr. Sharff: Very well.

Mr. Blackstone: I believe that he answered it, "Right."

The Court: He answered it, "Right."

Q. (By Mr. Blackstone): Now, between that first conversation with Mr. Watson and your first conversation with Mr. Reilly, did you have any further conversations with Watson?

A. No. I might have seen him, but nothing relative to his account.

Q. Now, you have stated that your first conversation with Mr. Reilly in regard to the taxes owing from Watson occurred in the latter part of January?

A. Yes, sir, 1948.

Q. And they came to your office in Merced?

A. Yes.

The Court: Mr. Blackstone, now, are you going to all of these conversations with Reilly? I presume that that is going to be an important phase of cross-examination, isn't it?

Mr. Blackstone: Yes.

The Court: Well, we have come to the noon recess, then, because that is going to be one of your basic subjects of discussion. I don't want to break it up because from what I have heard before, I deem it to be an important phase of [66] the case.

We will be at recess until 2:00 o'clock.

(Whereupon an adjournment was taken to 2:00 o'clock p.m.) [66-A]

Afternoon Session—2:00 P.M.

The Court: All right, Mr. Blackstone. Would you proceed with your cross-examination?

EDWARD H. HALTON

resumed the stand.

By Mr. Blackstone:

Q. I think we left off, Mr. Halton, at the time when Mr. Reilly came to your office and you had your first interview with him about the tax liability of Lloyd Watson. As I recall, you fixed that conversation as taking place some time in January, 1948; is that correct? A. Yes.

Q. Now, when Reilly came into your office he told you, did he not, that the Government had filed a tax lien against Lloyd Watson? A. Right.

Q. In the County Recorder's office in Merced County? A. Yes.

Q. He also told you, didn't he, that the date that that tax lien had been filed was September 16th, 1947?

A. Well, he may have. I don't remember whether he did that or not.

Q. Well, you may not have recalled the specific date, but didn't he give you the information as to the date of the tax lien?

A. He told me that the Government had filed a lien. [67]

Q. And didn't he also say that that lien was filed ahead of your chattel mortgage?

A. He probably did. I don't remember.

(Testimony of Edward H. Halton.)

Q. And didn't he tell you, Mr. Halton, that the Government tax lien then had priority over your chattel mortgage lien; don't you remember that?

A. Yes, that's right. And he went on to tell me, too, that since the social security taxes had been incurred upon these machines, those were the ones that the Government was going to exercise on.

Q. Do you mean to say, Mr. Halton, that the machines themselves somehow had incurred a tax liability? A. Right.

Q. Is that your understanding of what he said to you? Wasn't it rather that he told you that Lloyd Watson in his operations had incurred tax liability and that the tax then became a lien on his equipment?

A. No, because I pointed out to him that part of our machines were on conditional sales contract and he told me it didn't make any difference.

Q. You mentioned that you had a conditional sales contract to him? A. Yes.

Q. Did you exhibit a copy of the contract to him? A. No. [68]

Q. Did you tell him what date it had been entered into? A. No.

Q. Well, Mr. Reilly told you, did he not, that the Government intended to take hold of the equipment and sell whatever interests—— A. Yes.

Q. ——that Mr. Watson had in the property, is that correct?

A. He told me they were going to sell it for this tax lien.

(Testimony of Edward H. Halton.)

Q. And he had told you that in his opinion the tax lien had priority over your chattel mortgage lien, is that correct? A. Yes.

Q. Now did Mr. Reilly tell you that the Government tax lien had priority over your interests in the property under the conditional sales contract?

A. Yes, over everything. I was stuck for the whole works.

Q. In other words, you are saying then that Mr. Reilly told you that the Government would come along and sell out your interest in the property; is that what you said?

A. That's right, that's exactly right.

Q. And after you had been very careful to point out to him the conditional sales agreement?

A. (Witness nods head in the affirmative.)

The Court: The witness nodded his head in the affirmative. I don't know if the reporter got that or not.

Q. (By Mr. Blackstone): Did you consult an attorney about [69] the right of the Government to sell your interest and property to pay somebody else's taxes? A. Yes.

Q. At that time? A. Yes.

Q. And what advice did you get?

A. He told me I had to pay the taxes.

Q. That the Government could sell out your interest under your conditional sales contract, is that what your attorney told you? A. Yes.

Q. Did you mention to Mr. Reilly that you were claiming under the Morris Plan chattel mortgage?

(Testimony of Edward H. Halton.)

A. I do not think so. I didn't have any claims under anything, according to Mr. Reilly.

Q. Isn't it true that in that first conversation you then asked Mr. Reilly how the tax lien could be released, what could be done to release the tax lien from that equipment?

A. Yes, probably I did.

Q. And didn't Mr. Reilly tell you that the way the tax lien could be released is if you would pay the taxes that were due?

A. Right. He told me I had to pay them.

Q. Did he say you individually were liable for the taxes of Mr. Watson? [70]

A. Right.

Q. Did you consult a lawyer about that statement of Mr. Reilly's?

A. That is what he said.

Q. That you individually owed an obligation to the United States Government for the taxes of Lloyd Watson?

A. I explained to my lawyer verbatim what Mr. Reilly had told me, and the lawyer said he was correct.

The Court: Well, that wasn't, however, that you personally owed the taxes, was it?

A. No, because of the lien on the taxes—on the equipment that we had in our possession, right.

Q. (By Mr. Blackstone): All Mr. Reilly said to you, Mr. Halton, is that, is it not—I am asking you the question—that to release the tax lien the taxes would have to be paid?

(Testimony of Edward H. Halton.)

A. Well, that is not all he said to me, but he said that.

Q. Well, what else did he say in addition to that?

A. He told me our possession was inferior to the Government's and that we had to pay the taxes or the goods would be sold; the Government would sell them.

Q. And he also, you recall specifically that he told you your interest under the conditional sales contract was inferior to the tax lien?

A. Right.

Q. You do recall that specifically? [71]

A. Sure.

Q. Now you mentioned you asked Reilly how much the taxes were, and that he stated that they were somewhere between \$7500 and \$8000, is that correct? A. That is correct.

Q. Did he state to you——

A. He thought that they were—he told me that he did not have a total at that time and that he thought that that was what the total would run to.

Q. Did he say that that would include penalties and interest, or did he say that that was just the amount of tax?

A. No. He didn't elaborate on that at all.

Q. Now your next contact with any agent of the Government was your conversation with Mr. Crisa, I believe that is C-r-i-s-a?

A. Crisa, that is correct.

Q. Now your conversation with him as reported

(Testimony of Edward H. Halton.)

on your direct examination was that Crisa also told you that you had to personally pay the taxes; is that what he told you?

A. Mr. Crisa told me that what Mr. Reilly had told me was correct, that I had to pay the taxes.

Q. Isn't it true that what Mr. Crisa told you was that to release the Government tax lien, the taxes would have to be paid?

A. That is not so. [72]

Q. Did you tell Mr. Crisa about your conditional sales contract? A. No.

Q. Did you tell Mr. Crisa about the Morris Plan chattel mortgage? A. No.

Q. Did you tell Mr. Crisa what interest you were claiming in that property?

A. What do you mean?

Q. What interest you were claiming in that property at that time when you had your conversation with Mr. Crisa.

A. The thing that I spoke to Mr. Crisa about was—I had been to the County Recorder's office and I had seen there was a lien, and I came in to see Mr. Reilly to find out if he knew what that lien was and to try to work with him on the thing. And I asked Mr. Crisa, "Am I stuck for this lien?" And Connie said, "Yes," he thought I was. That is all I talked to him about. It was no more or no less.

Q. Mr. Crisa told you——

A. I felt very sad about paying \$10,000 or I thought at that time \$8,000.

Mr. Blackstone: I ask that that be stricken;

(Testimony of Edward H. Halton.)

his personal reactions I don't think are relevant.

The Court: All right, they will be stricken.

Mr. Sharff: It may go out, your Honor. [73]

The Court: He has already indicated as much anyway, however.

Q. (By Mr. Blackstone): After your conversation with Mr. Crisa you talked to Mr. Reilly on the telephone about going to Los Banos?

A. Right, right.

Q. And Reilly told you, did he not, that he was going down there to attach the property?

A. Right.

Q. For the taxes? A. Right.

Q. You then suggested you drive down together in your car? A. Right.

Q. When you got to Los Banos—at your shop, was it? A. Yes.

Q. Or plant? A. Uh-huh, store.

Q. Store, thank you. Mr. Reilly then put notices on various pieces of equipment, is that correct?

A. Yes.

Q. You said ten tractors and scrapers?

A. Yes, sir; yes, sir.

Q. Did you tell Reilly at that time that any of those tractors were sold to Watson under a conditional sales contract by Mr. Wes Durston? [74]

A. No. I just told him four belonged to Mr. Wes Durston.

Q. You remember telling him that?

A. Yes.

(Testimony of Edward H. Halton.)

Q. And when you say they belonged to Durston, on what are you basing that statement?

A. Mr. Durston was in some way releasing or selling to Watson. I don't know what the average amount was between Watson and Durston.

Q. So on direct examination when you said that Durston owned those tractors, that was just a colloquial way of speaking that you didn't really know exactly what his interest in the property was, is that correct?

A. That's correct. I knew it was pretty good because Watson was going to return them to Durston.

Q. Now you mentioned in your direct examination stating to Mr. Reilly the Government was using Gestapo tactics here. Was that statement made to Mr. Reilly in your drive to or from Los Banos?

A. Yes, right.

Q. Did you accuse Mr. Reilly himself of using Gestapo tactics?

A. No. I accused him as a government agent of using Gestapo tactics and I used that rather loosely, of course. But if I recall, in 1947 and '48 there was a good deal of talk about that sort of thing. [75]

Q. Did Mr. Reilly make any personal threats against you if these taxes were not paid by you?

A. No. He just told me to pay them and then I could protest them, get a trial.

Q. You definitely recall Mr. Reilly telling you that you could——

A. I not only definitely recall——

(Testimony of Edward H. Halton.)

Q. Will you let me finish the question. You definitely recall Mr. Reilly telling you about a refund procedure, is that correct? A. Yes, sir.

Q. Now on this Los Banos trip, was it then that you mentioned to Mr. Reilly about the two automobiles, the pickup truck, I think you said, and another automobile? A. Yes, sir.

Q. I think on direct examination you said that was other equipment that wasn't covered by any chattel mortgage of yours, is that correct?

A. Yes——

Mr. Sharff: I think you misunderstood his testimony. My question was whether that was included in either the conditional sales contract or the Morris Plan mortgage. That was my question, Mr. Blackstone, if you will pardon my interruption.

Q. (By Mr. Blackstone): Well, it is true that these two [76] automobiles are covered by the mortgage, which is Defendant's Exhibit A, isn't that correct, the mortgage of October 2nd, 1947?

A. Which is it?

Q. Here (indicating).

A. Oh. That one. That is the same as this one here (indicating).

Q. And the two automobiles that you talked to Mr. Reilly about are the automobiles covered by that chattel mortgage, Defendant's Exhibit A?

A. Right.

Q. And those two automobiles, I think your testimony was, were not covered by the Morris Plan chattel mortgage? A. Right.

(Testimony of Edward H. Halton.)

Q. Now on this trip where you mentioned that the automobiles were in the possession of the McAuley Motor Company, you stated, did you, that when the proceeds from the sale were received you would turn that over to the government, is that correct. A. Correct.

Q. Did Mr. Reilly agree to that procedure?

A. Yes.

Q. And as I understand, then, Mr. Reilly had not pasted any notices on those two automobiles that were there?

A. No, sir. They were not in Los Banos at the time we were [77] there.

Q. It was you who brought up the fact that the automobiles were at the McAuley Motor Company? A. Yes, sir.

Q. And it was you who suggested to Mr. Reilly that those would be sold and the proceeds would be paid to apply to Lloyd Watson's taxes, is that correct? A. Yes, sir.

Q. And Mr. Reilly agreed to that?

A. Yes, sir.

Q. And in fact that was carried out; they were sold for \$2200 and that check was paid to the Government, is that correct?

A. Yes, sir.

Q. Now when you got back to Merced you had another conversation, did you not, with Mr. Reilly in your office in which your accountant was present, and you discussed the matter of a private sale by

(Testimony of Edward H. Halton.)

you of these tractors which had had notices pasted on them at your Los Banos shop?

Mr. Sharff: Will you read the question back, Miss Reporter?

(Question read.)

Q. (By Mr. Blackstone): If that is too complex a question, I will break it up.

A. We had discussed the sale of these goods ever since the [78] time we got in the automobile and started over towards Los Banos in the beginning—in the morning.

Q. Oh, I see. So you discussed on your trip to Los Banos? A. All the time.

Q. The matter of how the tractors would be sold? A. Right.

Q. Now isn't it true that you suggested to Mr. Reilly that you be permitted to repair those tractors, put them in condition and sell them privately?

A. Sure, after I paid the tax.

Q. Wasn't your first suggestion that from the proceeds of the sale the taxes would be paid?

A. Yes. But he told me I had to pay the taxes before we touched the goods after that white paper was stuck on there. It says, "Property of the United States." That was the heading of that slip of paper.

Q. Yes. But your suggestion was first to sell the property and from the proceeds to pay the taxes—I mean, let's take it one step at a time, Mr. Halton, if you can recall.

(Testimony of Edward H. Halton.)

A. My idea in the very beginning was to liquidate these goods for Mr. Watson.

Q. I understand that.

A. And we were thwarted in that because we had to pay the Government the money, which then we didn't know what the amount was, before we touched the tractors, which is what we [79] did.

The Court: The question that is asked is: Did you suggest to Mr. Reilly during these discussions that you would like to sell, repair, and reoutfit the equipment, and sell it at a private sale and reimburse the Government for the taxes out of the proceeds of the sale?

A. I may have suggested that, I may have suggested that.

The Court: Yes. Well, that is what he wants to know.

Q. (By Mr. Blackstone): That is what I am asking.

A. I may have suggested that.

Q. And then Mr. Reilly, isn't it true, said that the Government would insist on the taxes being paid first?

A. Right.

Q. And then you said, "All right," you would go ahead and do that?

A. Yes.

Q. And then didn't Mr. Reilly say that he would have to get approval for that procedure from the collector in San Francisco and that he would let you know?

A. No, sir. He told me he would let me know what the amount of the tax was.

Q. But he told you right then at the time that

(Testimony of Edward H. Halton.)

it was agreeable to go ahead and sell the equipment and to pay the taxes first and then sell the equipment?

A. After he had let me know what the amount was, yes, [80]

Q. That he did not say to you that he would have to check with the Collector in San Francisco?

A. I do not recall whether he said that to me or not.

Q. He may have said that?

A. He may have said that. I—I have no idea.

Q. You do not recall, then, a subsequent telephone call or conversation with Mr. Reilly in which he told you that he had been given authority to permit you to go ahead and make the sale after paying the taxes?

Do you want the question reread, Mr. Halton?

A. Yes.

Mr. Blackstone: I am sorry, Mr. Halton.

Miss Reporter, will you read the question?

(Question read.)

Q. (By Mr. Blackstone): My question may have been a little complex.

A. No, I don't recall that.

Q. In other words, then, as far as you remember, the entire arrangement was worked out during this trip to Los Banos? A. Yes.

Mr. Sharff: When you say "trip to Los Banos," do you include both the trip over and back?

Mr. Blackstone: Yes.

(Testimony of Edward H. Halton.)

Q. Some time during the trip from Merced to Los Banos or back again? [81]

A. Yes, sir.

Q. When the notices were placed on the equipment. Isn't it true that you told Mr. Reilly during the conversations that if you were permitted to sell this equipment at a private sale, you could realize—you thought you could realize enough to reimburse you for the amount owing to you from Watson plus the amount owing to the Government by Watson for the taxes? A. I hoped to, yes, I hoped to.

Q. And you told him that, didn't you?

A. I hoped to do that, yes.

Q. Now there have been introduced into evidence the two checks which the Halton Tractor Company paid to the Collector of Internal Revenue. They are Plaintiff's Exhibits No. 3 and No. 6.

Now there is nothing on these checks, is there, Mr. Halton, which indicates that the payment was made under protest? A. No, no, nothing.

Mr. Sharff: Just a second. Your Honor, that was answered before I had a chance to object. The law does not require that the payment must be made with any protest accompanying it. Section 3772, Title 26, says, "Any wrongfully collected taxes may be recovered regardless whether they were paid under protest or not." [82]

The Court: Would you read the question again, Miss Reporter?

Mr. Blackstone: May I say this, your Honor, that the law appears perfectly clear that where the evidence is that one person pays the taxes of an-

(Testimony of Edward H. Halton.)

other voluntarily and without duress that he cannot get it back. I submit that that is the law applicable here and that is the point I am trying to develop.

The Court: Well, the only thing that occurs to me that when you say, "There is nothing on there——"

Mr. Blackstone: They speak for themselves.

The Court: They speak for themselves.

Mr. Sharff: It doesn't have to be with them. That is the point of my objection.

Mr. Blackstone: I was just going on—perhaps if the question could be withdrawn because, as you point out, there is nothing on there.

Mr. Sharff: There is nothing on there to dispute Mr. Blackstone's statement of law. We can argue that, of course.

The Court: Well, that is an argumentative question. The answer will be stricken and the question withdrawn.

Q. (By Mr. Blackstone): Very well. Was any letter of transmittal sent with those checks, with either of those checks, Mr. Halton?

A. I handed one of the checks personally to Mr. Reilly, and [83] the other one I do not recall just what we did with it.

The Court: Well, what he wants to find out is was there at that time any protest made.

Mr. Blackstone: Yes, that is what I want.

A. No, there was no protest made.

(Testimony of Edward H. Halton.)

Mr. Sharff: That question, I presume, is over my objection, your Honor?

The Court: Yes; well, you may object. I will overrule the objection there because that just simply goes——

Mr. Blackstone: It's a question of law involved.

The Court: Well, it goes to a question of fact, did he make any protest at that time, that is, a written protest of any kind.

Mr. Sharff: Well, it may be incompetent, irrelevant and immaterial, your Honor. That is the reason I make my objection.

The Court: Well, I will overrule that objection.

Mr. Sharff: Very well.

The Court: And your answer is that you didn't make any official—any formal protest at that time?

The Witness: I didn't write anything on the checks, nor did I accompany them with a letter, no.

The Court: That followed later; you did that through an attorney? A. Yes, sir. [84]

Q. (By Mr. Blackstone): Now, if I could refer to the Morris Plan chattel mortgage and the subsequent mortgage for a moment, Mr. Halton. As I understood your direct testimony, it was that this—or perhaps it was not on direct examination, I think it was on cross-examination—the second chattel mortgage worked out a different time payment plan? A. Yes, sir.

Q. For Halton—for Lloyd Watson?

A. Yes, sir.

(Testimony of Edward H. Halton.)

The Court: He said that on direct examination, too.

Mr. Blackstone: I was confused.

The Court: He said the purpose of the second—or he didn't say that it was the second mortgage, but he said the refinancing plan was that they—the time of payment would be extended and the amount of payment would be reduced.

Q. (By Mr. Blackstone): Now, one further thing. Wes Durston took back, didn't he, the four tractors that were in the yard at the time that those notices were pasted on them?

A. No. He didn't take them back after we had paid the money. But they stayed there in our yard, oh, for two or three months, as I remember.

Q. And then Mr. Durston took it? A. Yes.

Q. The tractors?

A. Yes. He sent up for them. [85]

Q. And he sold those, or you don't know what he did?

A. He took them away from our place in Los Banos.

Q. So you had nothing further, no further contact in regard to those tractors? A. Right.

Q. You mentioned going through a refund procedure. Did you yourself participate in any conference with the representatives of the Internal Revenue Service in connection with your tax refund claimed? A. No, just I talked to my attorney.

Q. Your attorney was Mr. Jonas? A. Yes.

(Testimony of Edward H. Halton.)

Q. I would like to show you a letter here which bears Mr. Jonas' signature.

Mr. Sharff: May I see it?

Mr. Blackstone: (Showing to counsel.)

Q. And ask you if you saw the letter before it was prepared, or have ever seen a copy of that letter?

A. I have no recollection of ever seeing that letter. It's dated March 15th, 1950.

Mr. Blackstone: May I have this marked as Defendant's Exhibit B for identification?

The Court: All right. Defendant's Exhibit B for identification.

(Whereupon, letter of March 15, 1950, referred [86] to above, was marked Defendant's Exhibit B for identification.)

Q. (By Mr. Blackstone): Did you have a chance to really read the letter and see?

A. Well, not thoroughly; I didn't get down to the last paragraph there.

Q. It was a letter enclosing certain documents, and it's addressed to the Collector of Internal Revenue, a list of these documents, chattel mortgage——

A. Yes, I have never seen that letter.

Q. I take it that the documents that are referred to here were documents that you gave to your attorney, Mr. Jonas, in connection with the refund claimed?

A. I think most of them are. I don't think all of those things are.

Q. True. Well, let me be specific, then. En-

(Testimony of Edward H. Halton.)

closure No. 4 refers to a photo copy of conditional sales contract of April 9th, 1947. A. Yes.

Q. That is something you furnished to your attorney? A. Yes.

Q. Item No. 5 is chattel mortgage dated October 7th, 1947. A. Yes.

Q. 6, photo copy of Lloyd Watson's analysis of taxes made by Deputy Collector Francis Reilly of Merced, California. [87] A. Yes.

Q. 7, photo copies of checks No. 4718—\$2,200, and No. 5022 for \$7,777—

Mr. Sharff: Your Honor, I presume that that is all preliminary. It's too early for me to enter an objection, but I too think all this matter is highly irrelevant, incompetent, and immaterial.

Mr. Blackstone: Not a bit, your Honor. I will be perfectly willing to state this point of line of questioning. There is a clear rule that in any tax refund suit the issues are definitely limited to those issues that were made before the Internal Revenue Service in connection with the tax refund suit. I want to establish that the only claims made by Halton Tractor Company before the Internal Revenue Service were claims based on the conditional sales contract of April 9th, 1947, and the chattel mortgage of October 7th, 1947; that there is nothing mentioned before the Internal Revenue Service about the Morris Plan mortgage.

I think it's extremely relevant because with that foundation I think it would furnish a basis for

(Testimony of Edward H. Halton.)

moving to strike all the testimony about the Morris Plan chattel mortgage.

Mr. Sharff: I don't understand the law to be that, your Honor, because out of the facts of this case as we stand here, I think the Government can get no greater rates than [88] they were regardless of what was said to the Government. That is my understanding of the law.

The Court: Yes, but how about having to exhaust your administrative remedies?

Mr. Sharff: They have stated this is a tax refund suit, your Honor. There might be some question about that, but the Government has conceded——

The Court: I understand the basis of the tax refund suit, that you have gone through an administrative procedure of some kind.

Mr. Sharff: Well, I don't—I am not too familiar with those proceedings, your Honor, not having handled them in any respect whatsoever. But in somewhere my recollection is that in the course of those proceedings the Morris Plan mortgage was brought up. Now I can be in error, but——

The Court: Well, that is another matter.

Mr. Sharff: That is my recollection.

The Court: It may very well be. But all Mr. Blackstone is asking, what did go—it may be that during the proceedings before the Commissioner that Morris Plan thing did develop. I wouldn't know that. There might have to be a matter of evidence. Or it may be that you were operating on

(Testimony of Edward H. Halton.)

one theory at that time and now you have another theory at this time.

Mr. Sharff: I would hardly think that is true, your Honor. [89]

The Court: Well, as I say, it's the theory, as I gather from what has been said, predicating the theory of the liability on the Morris Plan chattel mortgage is a theory that has been developed because you were in error as to the time the government lien had attached, isn't that correct, you had thought originally that the second chattel mortgage was sufficient?

Mr. Sharff: I had never thought so, your Honor. I can't speak for my associate counsel who was then handling the case. [89A]

Mr. Blackstone: Well, I believe that the question, the last question has been answered and I submit, your Honor, that it's relevant for the purposes as stated to the Court.

The Court: Well, I will overrule the objection so the record will be clear and the answer will stand.

Mr. Blackstone: I would like to offer this letter in evidence. I don't think that you have any objection to its authenticity, bearing, Mr. Jonas' signature, offering it for the purpose I have elaborated on.

Mr. Sharff: I have none, your Honor, subject to our objection.

The Court: All right. The objection is overruled.

(Testimony of Edward H. Halton.)

It will be admitted into evidence as Defendant's Exhibit B.

(Whereupon, the letter referred to was received in evidence and marked Defendant's Exhibit B.)

The Court: What is the date of that, Mr. Clerk?

The Clerk: March 15th, 1950.

Mr. Blackstone: I think I have no further questions.

Redirect Examination

By Mr. Sharff:

Q. Mr. Halton, I have just a couple more questions.

Mr. Halton, in your conversations with Mr. Reilly do you recall whether or not when he spoke of a mortgage did he identify any particular mortgage as the one he was referring to? [90]

A. Mr. Reilly, in my memory, simply told us that our rights under our mortgage and our conditional sales contract were not good. I mean, they were not—they were behind the government in this case.

Q. At the time you went over at Los Banos with Mr. Reilly, do you know whether or not—did you know whether or not Mr. Durston had repossessed the equipment, the DW10 and D-8's over there for Mr. Watson?

A. No, sir. Mr. Watson was driving the DW10's into our lot. He placed them on our lot, and had

(Testimony of Edward H. Halton.)

told me that he was going to turn them back to Mr. Durston.

Q. Now, you stated that—Mr. Blackstone, rather, asked you if you recalled Mr. Reilly on this trip from Los Banos telling you that you could pay the taxes under protest and then recover them back. Do you recall the place where the conversation took place?

A. I vividly recall that conversation and exactly in the place in the road where the road—the Los Banos highway runs generally east and west and it is—it was at an intersection with the road that goes down to the McNamara Ranch. I don't know the name of the road. But I remember the exact place that I said that—made that remark because I was very heated about it.

Q. Now, tell me this—

Mr. Blackstone: Pardon me. Where you made the remark, I [91] don't think that is responsive to the question. Will you read the question back, please?

The Court: Just a moment.

Mr. Blackstone: I submit that is not responsive to the question. The question was in terms of where did Mr. Reilly tell you about a refund procedure.

The Court: Yes, that is the tenor of the question.

Q. It was in the automobile on the highway 152?

Mr. Sharff: All right.

Q. (By Mr. Blackstone): Do you recall the exact place?

(Testimony of Edward H. Halton.)

A. Right where the McNamara Road comes into the highway.

Q. (By Mr. Sharff): Now, Mr. Halton, in response to one question put by Mr. Blackstone, it was on the subject of the proceeds of these two automobiles; what, if anything, at Los Banos did Mr. Reilly say he would do about the autos when you told him they were up for sale?

A. He told me that they were subject to the same situation that the tractors were, the DW10 tractors were, and that they were, they were subject to having the signs pasted on them in just exactly the same manner. And I told him, as I have testified, that we agreed to turn this money over from the sale of the automobiles and all of the money from the sale of the automobiles directly to him, which we did.

Mr. Sharff: That is all, Mr. Halton.

The Court: Any questions, Mr. Blackstone? Any recross? [92]

Mr. Blackstone: Yes, your Honor.

Recross-Examination

By Mr. Blackstone:

Q. Well, the first question asked you on redirect examination, Mr. Halton, was in regard to what Mr. Reilly told you about your position under the chattel mortgage.

Now, you referred to "our chattel mortgage." What were you referring to when you said "our chattel mortgage"?

(Testimony of Edward H. Halton.)

A. I am looking at the two of them right here.

Q. I think you did say on cross-examination you don't recall specifically mentioning the Morris Plan chattel mortgage to Mr. Reilly.

A. That is correct; that is right.

Mr. Blackstone: I have no further questions.

Mr. Sharff: That is all.

The Court: You may step down.

WESLEY J. DURSTON

called as a witness on behalf of the plaintiffs; sworn.

The Clerk: State your full name for the Court and record.

The Witness: Wesley J. Durston.

Direct Examination

By Mr. Sharff:

Q. And where do you reside, Mr. Durston?

A. In Las Vegas, Nevada, at the present time.

Q. In about 1947 what was your business or occupation? [93]

A. Sale of used construction machinery.

Q. And under what name did you operate that business?

A. I owned the corporation Wes Durston, Inc., of which I was president.

Q. Is that corporation still in existence?

A. Yes.

Q. And you are still president of it?

A. Yes.

(Testimony of Wesley J. Durston.)

Q. And for about how many years were you in the used equipment, construction equipment business? A. About '37 to '50.

Q. Years 1937 to 1950, is that correct?

A. That is right.

Q. During the course of that time did you have a transaction with a man named D. R. Harryman?

A. Yes, I had several.

Q. Yes. Now, on or about March 13th, 1947, was Mr. Harryman indebted to you?

A. Yes. He was before that date.

Q. What? A. He was before that date.

Q. And before that date was his indebtedness owing to you on certain pieces of equipment?

A. That is correct.

Q. And what were they, sir? [94]

A. Well, they were principally four DW10 tractors and scrapers and four D8 tractors.

Q. Prior to March 13th, well, say, March 12th, 1947, was Mr. Harryman in default in his payments to you? A. Yes, very definitely.

Q. Now, on or about March 13th, 1947, was there a four-way transaction involving the four DW10 tractors and the four D8 tractors between D. R. Harryman, Lloyd Watson, yourself and the C.I.T. Corporation? A. Yes.

Q. Will you tell us briefly in a few words the nature of that transaction?

A. Mr. Harryman had purchased from me previous to this March 13th date this aforementioned equipment. And he was in a bad state of delinquency

(Testimony of Wesley J. Durston.)

with the contracts. He came up with this sale to Mr. Watson, Mr. Lloyd Watson. The sale was consummated about that time partially as a relief of the delinquency of Mr. Harryman and partially on the hope that they would be able to pay it out through this new contract that he had recently acquired.

Q. Then they entered into a sale on that date and you were the seller, weren't you? A. Yes.

Q. And then what did you do with that contract?

A. I sold that contract to the C.I.T. Corporation. [95]

Q. I will ask you if you recognize this as an original conditional sales contract involved in this transaction. A. That is correct.

Q. I ask you if on the back of the promissory note attached hereto your signature appears.

A. That is right.

Q. You are the endorser of that promissory note? A. Right.

Q. And that the signatures on the face of it are those of Lloyd Watson and D. R. Harryman?

A. That is correct.

Q. I will ask you if you received the sum of \$51,000 from the C.I.T. Corporation in pursuance of the sale of—

A. In the sale of this document, yes, I did.

Mr. Blackstone: How much was that figure?

Mr. Sharff: \$51,000.

I will ask that that be received as Plaintiff's next in order.

(Testimony of Wesley J. Durston.)

The Court: It will be received into evidence as Plaintiff's Exhibit 7.

(Whereupon conditional sales contract was received in evidence and marked Plaintiff's Exhibit No. 7.)

Mr. Sharff: Your Honor, I presume you would like to inspect this. I will call your Honor's attention to the fact that on the back is the promissory note attached to the contract [96] involved, and then although it is attached on there, in the back is where the endorsement is of Mr. Wes Durston. You have to look underneath it right there, under, to find it.

The Court: Yes. The note is endorsed, is what you mean?

Mr. Sharff: Yes. The promissory note is endorsed by Mr. Durston.

The Court: The assignment—it is signed by Mr. Harryman?

Mr. Sharff: Yes.

The Court: All right.

Q. (By Mr. Sharff): During the year 1947 did Lloyd Watson make the payments to the C.I.T. Corporation required by that contract just received in evidence?

A. He did at no time make distinct payments. There was some reduction of the face of that conditional sales contract, however.

Q. Now, in the fall of 1947 was the contract current? A. No, it was not.

(Testimony of Wesley J. Durston.)

Q. Did you have any conversation with Lloyd Watson about that?

A. We contacted Mr. Watson on two distinct——

Q. When you say “we,” you mean yourself?

A. Well, myself, that is right. I contacted Mr. Watson on two distinct occasions in regard to his delinquency.

Q. Do you recall where those conversations took place?

A. They took place in a restaurant at the Hotel Los Banos. [97]

Q. Can you fix the time or the day of those conversations and who was present, if anybody?

A. I couldn't tell you the date. I do know that it was in the late summer or early fall, was the first time that I contacted him on his contract payments.

Q. And what was the conversation the first time?

A. The first time was that his contract had gone rather slowly, but he assured me that he would be caught up and be in good shape. He also at that time elaborated on some of the equipment was idle and perhaps something could be done in that regard.

Q. Can you tell us when the second conversation was?

A. The second conversation was near the end of the year, I would say November or surely in the forepart of December because it was our custom to always clean up all the accounts at the end of the year. We made a very strenuous effort to get everything in as near current condition as we could before closing the annual books.

(Testimony of Wesley J. Durston.)

Q. And what was the substance of the second conversation, Mr. Durston?

A. In the second conversation he come out and flatly stated that he was unable to make the grade, so to speak, and that he would have to return the equipment. And so at that time he promised to bring the equipment in and he suggested that I could get space in the Los Banos yard of the Halton [98] Tractor. And subsequently I did arrange that space and it was brought in there.

Q. Later on did you have a call from Mr. Halton about the fact that Mr. Reilly—that the United States government put some tags on the property? Yes or no? A. I did, and previous——

Q. Do you know whether on that date of the call from Mr. Halton or before then, Mr. Watson had placed the equipment in the yard of Mr. Halton's company at Los Banos in accordance with your conversation?

A. He had put the equipment, my equipment in the yard, I would say, several days, and even a few weeks previous to the conversation that I had with Mr. Halton in regard to Mr. Watson's tax.

The Court: If you are going into the tax matter now——

Mr. Sharff: I beg your pardon?

The Court: If you are going into the tax thing, we will take our afternoon recess.

Mr. Sharff: This is a good place to stop, yes, your Honor.

(Testimony of Wesley J. Durston.)

The Court: The court will be at recess.

(Recess.)

Mr. Sharff: Would you give me the last question and answer, please, Miss Reporter?

(Record read.) [99]

Q. (By Mr. Sharff): How did you know that the equipment, the four DW10's and I believe one or two D8's were in the Halton Company's yard prior to the date that Mr. Halton called you and informed you about Mr. Reilly's visit?

A. I stopped at the yard on the way to San Francisco, inspected the equipment as to its condition, and proceeded on my trip. And that was several days or even a matter of two or three weeks before I had the call from Mr. Halton.

Q. During the recess, Mr. Durston, you called my attention to certain writing on the back of this conditional sales contract which is here identified as Plaintiff's No. 7.

Now, C.I.T. Corporation is here in print, that is crossed out with an ink line and we have Wes Durston written above it and some initials, D.R.H.

A. That was put in after I repurchased the contract from the C.I.T. Corporation in order to put myself in the proper relative position as a repurchaser of the contract.

Mr. Sharff: Does your Honor wish to note what he is referring to there? The changes right on that

(Testimony of Wesley J. Durston.)

spot were made after he received it back from the C.I.T. Corporation.

The Court: All right.

Mr. Sharff: You have photostats of these two documents, I believe, Mr. Blackstone?

Mr. Blackstone: Yes.

Q. (By Mr. Sharff): I show you a document bearing the stamped [100] number 701092 in the upper righthand corner, and ask you what that represents.

A. Well, it's further evidence of the nature of my guarantee to the C.I.T. Corporation.

Q. Is it connected with the document already received as Plaintiff's No. 7?

A. That is right.

Mr. Sharff: I ask that this be received as Plaintiff's next in order, your Honor.

The Court: The two of them are one?

Mr. Sharff: One. I will get the next one after identifying it.

The Court: All right. Plaintiff's Exhibit 8. What is the document?

(Whereupon assignment to be signed by seller-assigner was received in evidence and marked Plaintiff's Exhibit No. 8.)

Mr. Sharff: It's headed, the printed document, assignment to be signed by seller or assignor, I believe it says, contract of Lloyd Watson addressed Los Banos, California. It is assignment to the C.I.T.

(Testimony of Wesley J. Durston.)

Corporation. It is signed on March 7th, 1947, by Wes Durston.

Q. I show you another document, Mr. Durston, and ask you what that represents.

A. Well, it's just part of the clerical work of the C.I.T. [101] Corporation whereby they acknowledge that they have in their possession a valid contract and comment up here that the proceeds were sent to Wes Durston, Inc.

Q. This refers also to the same previous exhibits, same transactions of the previous exhibits?

A. Yes.

Mr. Sharff: I ask that that be received next in order for the plaintiff, your Honor.

The Court: All right. Plaintiff's Exhibit 9.

(Whereupon C.I.T. acknowledgment was received in evidence and marked Plaintiff's Exhibit No. 9.)

Mr. Sharff: Would your Honor like to look at this to see the nature of the documents, see the kind of invoice statement they hand out?

The Court: Yes.

Q. (By Mr. Sharff): Now, Mr. Durston, did you receive a telephone call from Mr. Halton with reference to having had a visit from Francis J. Reilly, agent of the Internal Revenue Department of the United States? A. I did.

Q. Do you recall where you received that call?

A. I received it in my office in Los Banos.

(Testimony of Wesley J. Durston.)

Q. And will you tell us what Mr. Halton told you that Mr. Reilly had said or done?

A. Well, he advised me that this was a tax lien put against [102] my property up there. And I said, "Well, that can't be so. I have repossessed that property and the title remains mine until it is entirely paid for. There is a conditional sales contract in force and they have no right to put a lien—rather,"——

Mr. Blackstone: May I interrupt at this moment? I am going to move that the testimony be stricken. It is hearsay, and I don't see that it has any bearing on the transaction that took place.

Mr. Sharff: I think it does, your Honor. It is part of the—it comes under the heading of an oral act. It's merely—he was—Mr. Halton was merely transmitting statements made by Mr. Reilly including this man's action later on, and paying \$3,900 which were claimed for him.

Mr. Blackstone: There is no showing that this had been brought to the attention of Mr. Reilly or has any connection with the government agents at all. It is purely hearsay and should be stricken.

Mr. Sharff: I don't think it's hearsay at all, your Honor. It's under the heading of oral acts.

The Court: Well, it could be a broad interpretation of it. I will overrule the objection because it is germane to this whole issue. However, I am not going to accept it for proof of what Reilly told Mr. Halton. That simply as a basis for the conduct of this man. [103]

(Testimony of Wesley J. Durston.)

Mr. Sharff: That is what I mean, your Honor. It's a matter of an oral act, the fact that the statement was made, whether it is true or not. It is not testimony to that. It is merely a fact that such a statement was made at a certain time. That is all it is offered for.

Mr. Blackstone: Was it offered to prove the truth of the statement made——

Mr. Sharff: No. It is only offered to prove that Mr. Halton transmitted to Mr. Durston the acts of Mr. Reilly, whether it be a true statement as to what Mr. Reilly said.

Mr. Blackstone: Then whatever comments were made by Mr. Durston certainly haven't any competency here or relevancy. That is what I move to strike.

The Court: I will deny the motion to strike. But I don't think that the argument is particularly necessary. It's what Halton told him, that is the important thing.

Mr. Sharff: Yes, I agree with your Honor on that.

And what did Mr. Halton say after you mentioned your conditional sales agreement, Mr. Durston?

A. He said that our possession, even though it was a conditional sales contract, was inferior to the possession of the government. And I immediately questioned that. But I was not a lawyer and I didn't know authorities. And he said he was quoting Mr. Reilly.

(Testimony of Wesley J. Durston.)

Q. Did Mr. Halton—— [104]

Mr. Blackstone: May I make my motion to strike that testimony, too, on the same grounds, your Honor, that it is hearsay?

The Court: Motion denied.

Q. (By Mr. Sharff): And, Mr. Durston, did Mr. Halton make a statement to you as to what action the United States government would take if the taxes were not paid?

A. He told me that they would repossess the equipment, the tractors, and sell them to satisfy their account.

Mr. Blackstone: It's understood my objection to strike goes to this entire line of testimony?

Mr. Sharff: So stipulated.

The Court: Your objection will be to it and your motion to strike will go to it. The objection will be overruled. The motion is denied.

Mr. Sharff: As a result of that conversation, did you pay certain monies to Mr. Watson to be applied on the payment——

Mr. Blackstone: I beg your pardon?

Q. (By Mr. Sharff): Withdraw that. As a result of that conversation did you, Mr. Durston, pay certain monies to Mr. Halton to be used in paying part of Mr. Lloyd Watson's taxes to the United States government?

A. At the time that I talked to Mr. Halton, he did not know the amount of the tax lien and he advised me that he would let me know later and we

(Testimony of Wesley J. Durston.)

would arrive at an equitable proportion, [105] at which time I would send him a check.

Q. And was there such a conversation later on that subject?

A. I believe that his man, Mr. Treadwell, came down to Los Angeles several weeks later with that information. And whether we mailed the check to Mr. Halton at that time or whether we gave it to his man, I do not remember.

Q. Do you remember what the amount was?

A. \$3,900.

Q. All right. Now, Mr. Durston, after you had repossessed the equipment from Mr. Watson——

Mr. Blackstone: I object to that. It assumes something not in evidence.

Q. (By Mr. Sharff): Well, I will withdraw that statement. After the equipment was in the yard of Halton Tractor Company, did you have a transaction with the C.I.T. Corporation in regard to the balance due under the conditional sales agreement with Mr. Watson? A. I did.

Q. What was that transaction?

A. Our relations with our financial agent is always very close. And I had to advise him immediately of any movement of any major portion of our equipment that they have on contracts. And in that relation I advised him that I had repossessed the equipment from Mr. Watson and now had it stored in yards of Los Banos. And so they immediately made [106] demand to me for the full payment of the balance of the contract and enforced——

(Testimony of Wesley J. Durston.)

Mr. Blackstone: I am going to move to strike the testimony, that it is a conversation where the person hasn't any connection with the government. I think it is hearsay and not admissible.

The Court: Well, what does it have to do with this?

Mr. Sharff: Well, it leads up to the fact, your Honor, that Mr. Durston was required by the C.I.T. Corporation to pay \$30,100 on March 21st, 19——

Mr. Blackstone: We can shorten this. I will stipulate that that was paid. I haven't any reason to doubt that.

Mr. Sharff: Well, that is all I am leading up to, showing how it happened.

The Court: Well, then, the objection is good in this case. But do you want to accept the stipulation?

Mr. Sharff: Is the stipulation, I take it, Mr. Blackstone, from what you have said, that on March 21st, 1948, Wes Durston, Inc., a corporation, under its guarantee of the conditional sales contract and the promissory note received in evidence as Plaintiff's Nos. 7 and 8, was required by the C.I.T. Corporation and did pay to them the sum of \$30,100?

Mr. Blackstone: Under pursuance to the guarantee.

Mr. Sharff: Pursuant to the guarantee.

Mr. Blackstone: Which is shown by the documents in [107] evidence.

Mr. Sharff: That's right.

Mr. Blackstone: That's right.

(Testimony of Wesley J. Durston.)

The Court: All right.

Q. (By Mr. Sharff): Mr. Durston, after you paid the C.I.T. Corporation, did you move the equipment to Los Angeles?

A. No. I didn't have occasion to move it until late in the summer. I believe it was August.

Q. And tell me, how did you move the equipment to Los Angeles?

A. With our own trucks.

Q. And can you tell us how much that cost you?

A. The records seem to indicate that it was between twelve and fourteen hours per trip and there was five trips from Los Banos.

Q. Just a second. Let's get this into figures. You say 12 to 14 hours, 12 hours?

A. Well, it would be approximately \$100 cost, let's put it that way, per trip.

Q. \$100 to move each tractor from Los Banos to Los Angeles?

The Court: He said five trips, \$500.

The Witness: Yes, that's right. And then I might add there was one tractor that had to be brought down from Lake County, which was further north. And it would certainly be \$125 to \$130 for that sixth trip. [108]

Q. (By Mr. Sharff): Were all the tires on the tractors?

A. No, they were not on my initial examination of the equipment. It was very despairing indeed. It was missing tires and tires that were flat and

(Testimony of Wesley J. Durston.)

broken up motors and the equipment was in ill repair generally.

Q. Do you recall particularly at this time whether you had to replace any particular tires on these tractors, Mr. Durston?

A. I had to replace two of the large tires. I distinctly recall they are quite expensive and several of the small ones had to be repaired or replaced.

Q. How much would the two large tires cost you?

A. Between five and six hundred dollars apiece.

Q. That would be \$1,000 then for the two tires?

A. That's right.

Q. After you took the equipment to your yard in Los Angeles, was it sold as is?

A. It was—it had to be repaired somewhat. It had to be made to run and then it was sold as is, yes, that's right.

Q. Do you have any records—any more—as to what it cost you to repair it and——

A. No, I do not.

Q. No more records. Well, Mr. Durston, do you know eventually what happened to this equipment?

A. I sold the four DW10's to either Hass Construction Company or Haas Construction Company, I don't recall for sure [109] which—they have since gone out of business—for a total of \$20,000 for the four units.

Q. That is four DW10's, then, went for \$20,000. Do you recall that transaction personally? Do you?

(Testimony of Wesley J. Durston.)

A. Very distinctly. I am in charge of all sales.

Q. We have also two D8's which you took to Los Angeles under this contract, is that correct?

A. Yes. One of those——

Q. Do you recall the sale of these D8's?

A. One of those was fairly recent, D8, and it sold for \$6,500.

Q. And what about the other D8?

A. The other one was an older one. It sold for \$4,000.

Q. Do you recall to whom those sales were made? A. No, I do not.

Q. Have you searched for records to find these?

A. We have made quite an extensive examination and we failed to find——

Q. Mr. Durston, the bookkeeper you had at that time, is he still alive?

A. No. He passed away last July, '54.

Q. Yes. And your present bookkeeper is unable to locate any exact records? A. That's right.

Q. And your brother, I think, was there in the business with [110] you at the same time also, was he?

A. He was my active manager and he remained on the place all the time.

Q. Is he alive?

A. No. He passed away on December 27th of this year.

Q. You mean January 27th. A. This year.
Mr. Sharff: I think that is all.

(Testimony of Wesley J. Durston.)

Cross-Examination

By Mr. Blackstone:

Q. Mr. Durston, I gather from your testimony that you had no personal conversations with Mr. Reilly whatsoever? A. That is correct.

Q. You never submitted a copy of the conditional sales agreement to anyone connected with the Internal Revenue Service, did you?

A. No, I never did. Well, I qualify that statement by saying that Mr. Jonas has since presented it.

Q. Well, I mean until the claim for refund was filed. A. That is right, yes.

Q. Now, I gather from the exhibits that have been introduced that when you first turned over this conditional sales agreement to the C.I.T. you paid the amount—or you received the amount of the charge there shown on your Exhibit No. 9. This exhibit shows—well, the settlement figure, [111] \$51,000. Is that the amount you received?

A. That is correct, yes.

Q. And then you said the C.I.T. Corporation—we stipulated, I think it was March 2nd, 1948—you were under your guarantee, you had to pay them \$30,100? A. That's right.

Q. And it was then, was it not, that you put your name back in here on the conditional sales agreement? A. That's right.

Q. As the assignee, whereas theretofore it had

(Testimony of Wesley J. Durston.)

been C.I.T. Corporation? A. Yes.

Q. And that was done some time around March 2nd, I suppose, is that correct, 1948?

A. That's correct.

Q. Now, in regard to the sale of this equipment that you took back from the Halton yard, did the sales you have testified to include the tractor you brought down from Lake County?

A. Yes, that's right. That was——

Q. Was that one of the D-8's? A. Yes.

Q. Which one was it?

A. One H-4413, I believe.

Q. Was that the one that sold for \$6,500?

A. That's right. [112]

Q. Well, now, the conditional sales contract provides for four D-8 caterpillar tractors and you only told about selling two of them. What happened to the other two?

A. Mr. Watson or Mr. Harryman—I don't know which one—had sold those two tractors before and had transmitted the entire proceeds to the C.I.T. in Los Angeles.

Q. I see. That is one of the reasons perhaps why the net amount owing under the conditional sale when C.I.T. retransferred it to you was not \$51,000 but was \$30,100? A. That's right.

Mr. Blackstone: I see. I have no further questions.

Mr. Sharff: I have several questions I overlooked on direct examination, your Honor, if I may ask them.

(Testimony of Wesley J. Durston.)

The Court: All right. You may reopen your direct examination.

Further Direct Examination

By Mr. Sharff:

Q. Mr. Durston, in any of the conversations with Mr. Halston was anything said about any future action you might take in connection with the money to be paid on account of Mr. Watson's taxes?

A. It was distinctly understood the effort be made, and essentially would have to be made, by Halton Tractor Company because they are the ones that paid to the government.

Q. Withdraw that. You don't understand what I mean. Did Mr. Halton say to you what procedure might be taken in any way [113] to recover the monies that were being paid?

A. I don't recall he said exactly what the procedure would be. But he said an effort was made. He said, "You have to pay this temporarily to clear it up, but he'll get it back."

Q. Well, when you paid the \$3,900 did you understand then that proceedings would be taken against the United States government to have that money repaid?

A. That's right.

Q. Yes?

A. It was paid distinctly in protest, as far as I was concerned.

Q. All right. Tell me this, in your opinion as a dealer in this class of merchandise, the prices at

(Testimony of Wesley J. Durston.)

which you sold them which you have related here on the stand: Was that the highest and best price obtainable on the market at that time?

A. They were very satisfactory prices in relation to the condition of the equipment.

Mr. Sharff: Yes. That's all.

Mr. Blackstone: No further questions.

The Court: All right. You may step down.

Mr. Sharff: I believe Mr. Blackstone wishes to call Mr. Reilly out of order, your Honor. It is perfectly agreeable to me.

The Court: He may.

Mr. Blackstone: May it please the Court, what we had in [114] mind, Mr. Reilly would like to get back to Madera tomorrow on business and I had an appointment in Sacramento tomorrow. I wonder if it would be at all possible after Mr. Reilly's testimony—I think we could finish today. There are one or two possibilities: Either we would brief the issues as they have developed up to now and not go into the somewhat complicated bookkeeping arrangement which would come in issue only if the first issue is decided against the government. Do you see what I mean?

We have this problem as to what were the costs of sale, as far as Halton Tractor is concerned, which would become relevant only if the contention of the government is not sustained that this was a voluntary payment. And I think—I anticipate that that could be a rather involved technical cross-examination on my part. It would be perhaps possible

for me to sit down outside of court to go over the books and we might simplify that aspect of the case. That is entirely up to your Honor's view of the matter and whatever would be agreeable to plaintiff's counsel.

Mr. Sharff: Well, it isn't a question—I am always willing to accommodate you, Mr. Blackstone. I know your desire to get to Sacramento, but Mr. Halton and Mr. Bostick are both from Merced. They have been up here since yesterday and they would rather finish tomorrow if it is agreeable to your Honor. [115]

The Court: Which court will you be in contempt of, Mr. Blackstone?

Mr. Blackstone: I won't be in contempt. It's just a matter of interviewing witnesses on another case and it's just a matter of putting it over. It's just a matter of convenience to me.

The Court: Well, it's a question of balancing convenience. I think we ought to conclude the matter if we can. I don't know what the answer is. But these people come from out of town, Mr. Blackstone, and I want to do my best to accommodate them. Then if you want to call Mr. Reilly——

Mr. Blackstone: If that is agreeable.

Mr. Sharff: ——certainly I have no objection.

FRANCIS J. REILLY

called as a witness on behalf of the defendant;
sworn.

The Clerk: State your full name for the Court
and jury.

The Witness: Francis J. Reilly.

Direct Examination

By Mr. Blackstone:

Q. Mr. Reilly, where do you reside?

A. Madera, California.

Q. And what is your occupation?

A. Collector for the Internal Revenue Service.

Q. How long have you been so employed?

A. Oh, since about 1940—'41.

Q. Were you a deputy collector for the Internal
Revenue [116] Service in 1947 and 1948?

A. I was.

Q. Where were you stationed?

A. 1947 in Merced.

Q. In Merced?

A. Yes, sir. Part of the time I was—August
through '47, '48 and '49. Prior to that I was in
Fresno.

Q. When did you first discover that there was
an outstanding tax liability of Lloyd Watson?

A. When I was transferred from Fresno to the
Merced office. The cases were transferred to me by
the party who had them before who was leaving the
Department.

Q. And when would that be?

(Testimony of Francis J. Reilly.)

A. August of 1947.

Q. Had you received warrants of restraint in connection with the tax liability of Lloyd Watson?

A. Yes. There were warrants of restraint.

Q. Did you contact Lloyd Watson about paying the tax liability? A. On numerous times.

Mr. Blackstone: Would you mark this as Defendant's next exhibit for identification?

The Court: Defendant's Exhibit C for identification.

(Whereupon, financial statement referred to was marked Defendant's Exhibit C for identification.) [117]

Q. (By Mr. Blackstone): Mr. Reilly, I show you Defendant's Exhibit C for identification and ask you if you can identify what that exhibit is?

A. Yes. It's a financial statement of Lloyd Watson that he gave me as of 8/23/47.

Mr. Blackstone: I ask that be offered in evidence, your Honor.

Mr. Sharff: We object to it, your Honor, as being incompetent, irrelevant and immaterial. It can in no way be binding upon us, your Honor.

Mr. Blackstone: Your Honor, it's offered to show—I think there has been enough testimony here that they have placed in issue or attempted to, the good faith of Mr. Reilly in this whole transaction. If they are willing to stipulate that that isn't in issue, perhaps this exhibit can be withdrawn.

(Testimony of Francis J. Reilly.)

Mr. Sharff: I don't know what you mean by good faith, Mr. Blackstone. I haven't used the word duress here, meaning putting a gun at a man's head, no, or placing a man in fear of injury to his person. But my only contention is what we call duress of goods under the decision of the United States courts. Now, I don't know what you mean by good faith. Have I clarified the atmosphere in that respect?

Mr. Blackstone: Well, I intend to establish by this exhibit and through further testimony of Mr. Reilly that he [118] had no information about any conditional sales agreement, and that the only information we had was about the chattel mortgage, which was filed for record after the tax lien was filed. And I think this is relevant in that connection.

The Court: I will overrule the objection. It will be admitted into evidence as Defendant's Exhibit C.

(Whereupon, Defendant's Exhibit C, previously marked for identification, was received in evidence.)

Q. (By Mr. Blackstone): Did Mr. Watson at any time tell you that he was purchasing equipment under conditional sales agreements?

A. He did not.

Mr. Sharff: I don't think—just a second—the same objection, your Honor.

The Court: Well, I will overrule the objection.

(Testimony of Francis J. Reilly.)

Q. (By Mr. Blackstone): Your answer was——

A. He did not.

Q. Now, it has been stated heretofore, I think the plaintiffs are willing to stipulate, that a tax lien was filed on September 16, 1947. I have a certified copy from the County Recorder of the tax lien which I should like to produce in evidence at this time.

The Court: All right.

Mr. Sharff: No objection, your Honor.

The Court: It will be admitted into evidence as Defendant's [119] Exhibit D.

(Whereupon, notice of tax lien under Internal Revenue laws was received in evidence and marked Defendant's Exhibit D.)

Q. (By Mr. Blackstone): I show you Defendant's Exhibit D, Mr. Reilly, which is a notice of tax lien filed September 16, 1947, the office of the County Recorder of Merced County. Are you acquainted with the filing of that notice?

A. Yes, sir.

Q. At the time that notice was filed had you checked the records of the County Recorder's office in regard to chattel mortgages outstanding against Lloyd Watson?

A. I have.

Q. What did you discover?

A. I found none.

Q. Thereafter did you have occasion to discover a chattel mortgage which has been introduced into evidence and is dated October 2nd, 1947?

(Testimony of Francis J. Reilly.)

A. I did.

Q. When did you first discover that chattel mortgage?

A. Oh, probably two or three weeks after it was recorded.

Q. Would you state——

A. I was up at the courthouse checking for—on this same deal after talking to Mr. Watson——

Q. Would you state what subsequent steps you took in connection [120] with the collection of taxes on the assessment against Lloyd Watson?

A. I did everything possible to collect the money from Mr. Watson. I contacted him numerous times. I asked him when he was going to pay it. He kept telling me that as soon as the other deal was finished, which he had in court, he would be able to pay all taxes.

Q. When was it that you discovered that he had some equipment—that some tractors that had been——

A. Well, I knew he was a land leveler, so he must have the equipment.

Q. Well, did you discover from any source that these tractors were going to be placed in the possession of Halton Tractor, or had been placed in the possession?

A. I did not know that until Mr. Watson called me and told me he had taken them into Mr. Halton's yard into Los Banos.

Q. When did he tell you that, if you can remember? A. Probably in November, I think.

(Testimony of Francis J. Reilly.)

Q. Of 1947?

A. I think so; November, or it was shortly after he brought the equipment into Mr. Halton's yard in Los Banos he called me.

Q. Did you thereafter have a conversation with Mr. Halton about this property?

A. I did. [121]

Q. And when was the date of that conversation, the first one you had, as far as you can fix it?

A. Gee, I would say the latter part of October or November. November.

Q. 1947? A. 1947, yes, sir.

Q. Where did the conversation take place?

A. The first conversation took place in Mr. Halton's office.

Q. And what was the conversation you had at that time?

A. I told Mr. Halton that we had tax liens against Mr. Watson and that the government was going to take steps to take the machinery that Mr. Watson possessed and would sell it, if necessary, to recover the taxes. Now, these liens were never filed against either Mr. Halton or against Mr. Durston.

Mr. Sharff: I ask that it be stricken, your Honor.

Mr. Blackstone: I agree to that.

The Court: All right. The last part will be stricken.

Q. (By Mr. Blackstone): What statements

(Testimony of Francis J. Reilly.)

were made to you at that first conversation by Mr. Halton?

A. Oh, Mr. Halton told me that he had certain interests and that he had a mortgage, chattel mortgage, recorded at the courthouse which I knew because I had checked on it. And I told him that my—that the government lien was prior to his chattel mortgage and that the government had first crack at [122] that machinery, or at the equity that Watson had in the machinery.

Q. Did Mr. Halton tell you about a conditional sales contract——

A. He did not.

Q. ——that he had. Would you wait until the question is finished, Mr. Reilly? He did not, you say?

A. He did not.

Q. Did he mention to you in that conversation anything about the Morris Plan chattel mortgage?

A. No, sir, he did not.

Q. During the conversation did Mr. Halton ask you what steps could be taken to have the government lien released from the property?

A. He did.

Q. And what did you say to him?

A. I told him the only way the government would release the lien was a payment of taxes.

Q. Did you tell him that he, individually, was liable for the tax assessment made against Lloyd Watson?

A. I don't think I did. I don't recall ever telling him that at all.

Q. Have you ever told any taxpayer that?

(Testimony of Francis J. Reilly.)

A. No, sir.

Q. I mean, any third party? [123]

A. No, sir.

Mr. Sharff: I object—all right; let it go in. The Judge won't pay any attention to it.

Q. (By Mr. Blackstone): At that time did you give Mr. Halton an estimate of what the tax liability of Lloyd Watson would be?

A. I may have given him an estimate, but I guessed at it because I didn't know the exact figures which I told him.

Q. Is that substantially all of the first conversation, or are there other things that were discussed there bearing on the matter of the government tax lien?

A. No. I don't think there was any more of the things discussed.

Q. When was the next time you had a conversation with Mr. Halton?

A. I guess the next time was when we took the trip to Los Banos when I put the pasted signs on the equipment over in his yard that it was now the property of the United States Government.

Q. And during that trip would you relate the conversation you had with Mr. Halton in regards to the government tax lien and his interest in the property?

A. Well, if I recall right, I told Mr. Halton that the government was interested in the equity that Mr. Watson had in the property. But we put our signs on all property at the [124] time that was

(Testimony of Francis J. Reilly.)

in the possession of Mr. Watson regardless of whose yard it was in because I did not know at the time that Mr. Halton had repossessed the property. So I just—in other words, it was called Watson's property or equipment so the signs went on all of it.

Q. Did you state to Mr. Halton that under the procedures, as you understood them, the government could go ahead and hold a restraint sale on this property? A. Yes.

Q. What did he state when you informed him of that?

A. He told me that he had an equity in the property. And I realized that and I told him that we had a lien filed prior to his recordation of his chattel mortgage. That was the only thing that I knew about.

Q. During this conversation did he mention his conditional sales contract?

A. No, sir, he did not.

Q. During this conversation did he mention the automobiles which were not then at the Los Banos plant?

A. No, I don't think so. But I think they did mention it to me when we got over to the yard in Los Banos.

Q. What did he say to you about these two automobiles?

A. He told me the two automobiles were in the—at McAuley's Motors in Merced. And I told him then that I would have to put a sign on those, too;

(Testimony of Francis J. Reilly.)

as long as they had [125] anything to do with Mr. Watson that we had to do that.

Q. What did he state would be done with those automobiles?

A. Well, he told me they were going to be fixed up and sold.

Q. And did you agree to that or what was the——

A. No, I did not agree to anything because I couldn't until I got an O.K. from San Francisco.

Q. Did he make any statement to you about paying the proceeds from the sale to the——

A. At that time, no, sir.

Q. Do you recall any further conversation on this trip to Los Banos when you placed these notices? A. No, I don't.

Q. Do you recall the conversation related by Mr. Halton in which he accused the government of Gestapo tactics?

A. No, I did not recall that.

Q. During that trip did you advise Mr. Halton that the taxes could be paid under protest and a refund made for the taxes? A. I did not.

Q. Do you recall any time when you suggested to Mr. Halton that a refund could be made by following the normal refund procedure?

A. I do not recall that.

Q. When was the next conversation, as you recall, with Mr.—— [126]

A. The next conversation I recall was in Mr. Halton's office.

(Testimony of Francis J. Reilly.)

Q. That was after your trip to Los Banos?

A. That was after our trip to Los Banos. And that was at the time that Mr. Halton suggested that he take the machinery to Merced, fix it up and sell it. And I told him I would have to get an O.K. from San Francisco before I could do anything.

Q. Did he, in that conversation, make any suggestion in regard to payment of the taxes from the proceeds of the sale?

A. Yes. He said he would like to sell the machinery and pay the taxes. And I told Mr. Halton that the taxes had to be paid before the machinery was sold.

Q. Did you agree with him at that time that he could follow that procedure?

A. No. I couldn't agree with him because I hadn't had permission from the Department to do that.

Q. What did you do thereafter?

A. I went back to the office and called San Francisco, explained the situation to them and asked if it was O.K. because Mr. Halton was a respectable businessman. And I explained to them and they said, "Yes, if Mr. Halton wants to do it that way, it was O.K."

Q. Did you communicate that information to Mr. Halton? A. I did to Mr. Halton. [127]

Q. Was that by telephone or personal visit?

A. I don't know. I think it was by telephone.

Q. Thereafter you received the two checks that have been introduced into evidence, is that correct?

(Testimony of Francis J. Reilly.)

A. Yes, sir.

Q. For \$2,200 and for \$7,700 some odd?

A. Yes, sir.

Q. Was there any further transaction that you had in connection with this——

A. No, I don't think so. Oh, afterward when I finished the audit of Mr. Watson's taxes I sent that yellow paper—it's an exhibit there—or brought it over to him, to Mr. Halton, showing him the exact amount of taxes owed.

The Court: Mr. Reilly, what did Mr. Halton say when you told him that you had permission from San Francisco to permit a sale of the equipment with the proceeds to be paid out of the——

A. He said he would bring the equipment to Merced and fix it up and would pay the taxes.

Mr. Blackstone: I think you misunderstood the Court's question.

The Court: Well, as I understand you—I just want to be sure—as I understand your testimony, you say that Halton made the suggestion that the equipment could be sold at a private sale and the proceeds—and out of the proceeds of the [128] sale the taxes would be paid?

The Witness: Yes, sir.

The Court: You said you had to get permission from San Francisco from that, that you had to get authority from the Collector's office?

A. Yes, sir.

Q. That you phoned San Francisco and got authority and so advised Halton?

(Testimony of Francis J. Reilly.)

A. Yes, sir.

Q. That you had authority to permit that procedure to go forward? A. Yes, your Honor.

Q. Now, then, what did Halton say in response to that advice?

A. Well, Mr. Halton said that doing it that way he could get more for the equipment than he could get at a forced sale.

Q. What did he say he would do, if anything?

A. He said he would agree to pay the tax if we would agree to that stipulation.

Q. (By Mr. Blackstone): If I understand correctly, Mr. Reilly, the proposal you submitted to San Francisco was that the tax first be paid and then—— A. Yes, sir.

Q. ——and then the sale be made?

The Court: Was that your understanding, that he first [129] pay the tax? The question I asked you and I just—first of all, let's go back to Halton's suggestion, the one that he made. Did he make the suggestion that he, Mr. Halton, be allowed to repair the property and sell it?

The Witness: Yes, sir.

The Court: And then out of the proceeds of the sale pay the taxes?

The Witness: That was the first suggestion.

The Court: All right. Now, then, did you tell him that you had to get authority or permission to do that?

The Witness: That's right.

The Court: All right, then. What did you tell

(Testimony of Francis J. Reilly.)

him and then you say you called San Francisco, and what authority did you get?

The Witness: I got the authority to allow him to bring the machinery over to Merced and fix it up. But the tax had to be paid before the machines were sold because we could not release a lien without the money.

The Court: All right. That's what you advised Halton?

The Witness: Yes, sir.

Q. (By Mr. Blackstone): And Mr. Halton agreed to follow that procedure? A. Right.

Q. To pay the tax first?

A. That's right. [130]

Q. And then to sell? A. Right.

Q. But in regard to the automobiles, the automobiles were sold first, is that correct?

A. That's right.

The Court: You had never even touched the automobiles?

The Witness: I did not even put a sign on them.

Q. (By Mr. Blackstone): Now, I want to find out if at any time during these conversations with Mr. Halton did he ever bring to your attention the conditional sales contract that he had?

A. I do not recall of ever hearing of the conditional sales contract.

Q. I will ask the same question in regard to the Morris Plan chattel mortgage.

A. I never heard of it.

Q. As far as you knew, the only interest he had

(Testimony of Francis J. Reilly.)

was the interest that appeared in the October 2nd, 1947, chattel mortgage? A. Right.

Q. Did Mr. Halton at any time in any of these conversations with you mention to you that some of this equipment was being purchased by Lloyd Watson under a conditional sales contract from Wes Durston? [131]

A. I never even heard of Mr. Durston until a few months ago.

Q. Can you answer the question, Mr. Reilly?

A. I did not know it, no, sir.

Q. Did Mr. Halton state to you in any of these conversations that if permitted to make a private sale of the equipment——

Mr. Sharff: Please, now, your question is leading and suggestive enough already, Mr. Blackstone. I am going to interrupt you at this time and object to it accordingly. It is leading and suggestive as far as he has gone already, your Honor. I hope you will pardon the interruption.

The Court: All right. Mr. Blackstone, you reframe your question then. Do you want—I don't know what the purpose of it is.

Mr. Blackstone: I just wanted to ask Mr. Reilly if he recalls any conversation in regard to the advantage as opposed to disadvantage of a private sale or forced sale, and what Mr. Halton may have said about that, if anything.

Mr. Sharff: That is a permissible question. I have no objection to that.

The Witness: Mr. Halton told me that if he

(Testimony of Francis J. Reilly.)

was allowed to fix up the machinery that he was sure he would get what Watson owed him plus the taxes out of the machinery; where at a forced sale, he knew they was out, they would not [132] get that much.

Mr. Blackstone: I think I have no further questions.

The Court: You may cross-examine.

Cross-Examination

By Mr. Sharff:

Q. Mr. Reilly, I understood you testifying to something about checking the County Recorder's records in Merced in respect to Mr. Watson. Did I understand you correctly? A. Yes, sir.

Q. And for what period of time did you check them the first time you went to the County Recorder's office?

A. I don't quite understand what you mean.

Q. Well, when you searched the County Recorder's office at Merced, as I understood you did, over what period of time did you look?

A. I went back four or five years to see if there was any mortgages or liens filed against Mr. Watson at that time.

Q. And you tell us in that search you——

A. I found none.

Q. You didn't find the Morris Plan mortgage which was recorded on March 29th, 1947?

A. That's right. I found the mortgages. But ac-

(Testimony of Francis J. Reilly.)

cording to that mortgage book in the County Recorder's office, those mortgages had been cleared.

Q. You are testifying that you found on the books that the [133] Morris Plan mortgage had been released?

A. I did not know anything about the Morris Plan mortgage. I saw a couple of mortgages in there, or filed with Halton's—Mr. Halton's name on there. But I do not recall the Morris Plan at all. I don't even remember seeing it in the book.

Q. Well, probably you didn't intend to say Mr. Halton; did you intend to say Mr. Watson?

A. Mr. Watson, yes; sorry.

Q. You did find where Mr. Watson had given several mortgages, is that correct? A. Yes.

Q. And can you recall at this time definitely that one of them was not the Morris Plan mortgage?

A. No. I cannot because I did not see it. I didn't see anything about the Morris Plan in there.

Q. Well, let's get that definite. You did see several mortgages, is that correct? A. Yes, sir.

Q. Are you testifying under oath now that those you saw were not one to the Morris Plan?

A. Right.

Q. You didn't see that one of March 29th?

A. I did not, sir.

Q. Now, going to another subject, you testified that Mr. Watson phoned you and told you his equipment was in the yard [134] of the Halton Tractor Company at Los Banos, is that correct?

(Testimony of Francis J. Reilly.)

A. Yes, sir.

Q. Did you understand his statement to mean that all of the equipment which he owned was there on the Los Banos lot?

A. I took that for granted.

Q. All of it? A. All of it.

Q. Now, I will ask you to refresh your recollection. Didn't that conversation take place in Los Banos in person with Mr. Watson on the street?

A. No, sir.

Q. Didn't he tell you then and there that it was all over at Halton's place?

A. No. He called me, Mr. Watson called me.

Q. Well, then, you knew that all of the equipment Watson had was over at Los Banos, didn't you? A. I thought it was, yes, sir.

Q. And you knew, Mr. Reilly, didn't you, that Mr. Watson's equipment was subject to contracts of conditional sale, didn't you?

A. I did not, sir.

Q. You did not? A. I did not.

Q. Where is that financial statement? I ask you to inspect this financial statement, Mr. [135] Reilly.

A. There is nothing in here that says he has notes payable, accounts payable, and so forth. There is nothing in here that says anything about conditional sales contracts.

Q. I ask you to look where it says, "Contracts on Equipment."

(Testimony of Francis J. Reilly.)

A. Well, that doesn't necessarily have to be a conditional sales contract.

Q. You mean you don't understand where it says, "Contracts on Equipment" to mean conditional sales contracts?

Mr. Blackstone: Your Honor, that is argumentative.

The Court: Well, what is your purpose? The tone of the question was argumentative.

The Witness: No, I don't.

Q. (By Mr. Sharff): I am sorry, your Honor. I didn't mean it to be that way. Well, Mr. Reilly, tell me this: You received this financial statement August 23rd, 1947. It says: "Contracts on Equipment, \$76,265," is that correct? A. Right.

Q. Did you make any inquiry as to the nature of the equities of Mr. Watson in any of his equipment? A. I did not.

Q. You did not?

The Court: What is the number of that exhibit?

Mr. Sharff: C, your Honor, Defendant's C.

The Witness: The only thing that I [136] checked——

Q. (By Mr. Sharff): Well, there is no question before you, please, Mr. Reilly.

Did you make any inquiries of Mr. Watson as to any mortgages on his equipment?

A. Yes. I asked Mr. Watson who owned the equipment besides himself. And he told me Mr. Halton had an interest in it.

Q. Mr. Halton had an interest in it?

(Testimony of Francis J. Reilly.)

A. Yes, sir.

Q. Did you ask him the nature of that interest?

A. No, I did not.

Q. Can you tell me when this conversation took place?

A. It was before the equipment was taken in Mr. Halton's yard when I was trying to check the warrants that I had on Mr. Watson.

Q. In other words, as I understand you, in your conversations with Mr. Watson before he took the equipment to the yard of Halton—and that would also be before you saw Mr. Halton, wouldn't it?

A. Yes.

Q. —he told you Mr. Halton had an interest in the equipment, is that correct, sir?

A. He told me he was buying the equipment from Mr. Halton.

Q. He told you he was buying it from Mr. Halton?

A. That is right.

Q. Well, you said you went back and searched the Recorder's [137] records. Can you tell us when you did that, sir, approximately?

A. Let's see; it was about September—August, September. It must have been some time in August because I would have to file my—ask for a request, the lien to be filed, and the lien was filed from San Francisco. So it evidently was in August.

Q. That would be the second time you checked the County Recorder's records in August?

A. Right.

Q. Did you ever check them thereafter?

(Testimony of Francis J. Reilly.)

A. Check the County Recorder's office?

Q. Yes. A. Yes.

Q. In respect to Mr. Watson? A. Yes.

Q. Approximately when did you make the third search of the County Recorder's records?

A. When Mr. Halton told me that he had recorded the mortgage and I went to search the County records.

Q. And over what period of time did you search the records on that occasion?

A. Oh, I don't know.

Q. You don't know. Did you search for the year 1947?

A. Yes. I think it was back further than that, '45, '46, [138] and '47.

Q. And then you missed the Morris Plan mortgage?

A. I missed the Morris Plan mortgage, yes, sir.

Q. Did you ask Mr. Halton for a copy of his mortgage when he told you he had one?

A. Mr. Halton never told me until after the mortgage was filed that he had one. No, sir, I did not ask him for a copy.

Q. You didn't ask him for any documents he had, did you? A. No, sir; no, sir.

Q. Did you ever ask him if he had any other interests other than the mortgage? A. No, sir.

Q. Mr. Reilly, I want to be fair to you. Have you ever inspected the equipment covered by that Morris Plan mortgage? A. No, sir.

Q. You never have. Did you make a list of the

(Testimony of Francis J. Reilly.)

equipment covered by the mortgages given by Lloyd Watson that you saw in the County Recorder's office? A. Did I make a list?

Q. Yes.

A. There was no occasion to make a list.

Q. Why wasn't there, sir?

A. Because Mr.—before I had a chance to make a list or do anything, Mr. Halton told me that he would take care of the [139] taxes. And as long as he was taking care of the taxes, there was no sense in me making a list of the equipment.

Q. I see. Well, what I am asking you is this: You misunderstand my question. When you checked the County Recorder's office the first time——

A. Uh-huh.

Q. ——didn't you check the items and the mortgages to ascertain what assets Mr. Watson had?

A. That is all I did. I went to the big book there where they have "U. S. Government v. So-and-So" in there and I go down that list to find out who has a lien against who, to find out if the government has any liens filed against Watson; or then I checked back into the other books to see if Watson owed for any other mortgages.

Q. And then you did see that there was mortgages from Watson? A. Yes, but——

Q. Did you go and read the copies of them in the County Recorder's office?

A. No, sir, I did not.

Q. Oh. Let's get this definite. You did not inspect copies of any of the mortgages given by Lloyd

(Testimony of Francis J. Reilly.)

Watson as filed with the County Recorder's office in Merced?

A. That is right; I did not inspect any of them.

The Court: You just ran the indices? [140]

A. No, sir.

Q. (By Mr. Sharff): Mr. Reilly, I want to ask you again, when Mr. Watson made a statement to you that he was buying the equipment from Halton, did it suggest a conditional sales contract to you in your work? A. No, sir, it did not.

Q. It did not? A. No.

Q. What does this suggest to you, sir? A man says he is buying equipment?

A. That he is paying so much down and so much a month on the equipment. I went to the courthouse to check and I could find no chattel mortgage recorded against Lloyd Watson by Mr. Halton.

Q. You know about conditional sales contracts, I believe, from your work, don't you?

A. I handle very few of them.

Q. Well, you run into them, don't you, in your work? A. Now, yes.

Q. Oh, you didn't then; is that what you are telling me? A. That's right.

Q. At that time you were unfamiliar with the conditional sales contracts; is that what you are telling us? A. That's right.

Q. Well, Mr. Reilly, you went and saw this mortgage of Mr. [141] Halton's on file for only \$28,000, didn't you? A. Yes, sir.

(Testimony of Francis J. Reilly.)

Q. And you had in your possession and before you this statement, contracts payable, \$76,000?

A. Yes.

Q. Did you make any inquiry as to where or what other encumbrances there might be on this property of Mr. Watson?

Mr. Blackstone: It has been asked and answered.

The Witness: No, I did not.

Q. (By Mr. Sharff): You did not?

A. I did not.

Q. How did you happen to go to see Mr. Halton?

A. When Mr. Watson phoned me and told me that the machinery was being moved to Mr. Halton's yard, then I went to see Mr. Halton.

Q. What was your purpose in going to see Mr. Halton?

A. To tell Mr. Halton that he had tax liens filed against Mr. Watson. And Mr. Watson told me he had a certain equity in that machinery. Therefore, the tax liens covered that equity that Mr. Watson had of the machinery for taxes.

Q. You went there for the purpose of getting Mr. Halton to pay the taxes, didn't you?

A. I did not go there for the purpose of getting Mr. Halton to pay the taxes.

Q. Did you ask Mr. Halton how much money was due him against [142] this equipment?

A. I did not.

Q. Did you concern yourself with that?

A. No, sir. That would have come later at that time if we had had to sell the equipment. I would

(Testimony of Francis J. Reilly.)

have had to take an inventory to find out what his encumbrances were against the equipment.

Q. As I understood your testimony, Mr. Halton did not in your first conversation say or suggest that he would pay the taxes due from Mr. Watson, did he? A. No, he did not.

Q. He did not on the first day?

A. No, he didn't.

Q. And on the first day did you tell him that the alternative to him paying the tax was that the government would take this property and sell it?

A. I said the government had a right to sell Watson's equity in the property if it covered the taxes.

Q. Did you on any occasion tell him that the alternative to paying the taxes from the Halton Tractor Company was that the property would be seized and sold?

A. Wait a minute. Rephrase that question, please.

Mr. Sharff: Will you read it back? If you don't understand it——

The Witness: I did not. [143]

(Question read.)

The Witness: I did not.

Q. (By Mr. Sharff): You never did?

A. I was not interested in the Halton Tractor Company. I was only interested in Lloyd Watson paying the taxes.

Q. Mr. Reilly, under oath you gave a report to

(Testimony of Francis J. Reilly.)

Mr. Valde, to Mr. Walter Valde; is that correct, sir? A. Right.

Q. In regard to this matter—do you wish to inspect it?

A. I do. There is nothing—the only thing I stated in here was that the government would take restraint action against the property over here being held by Mr.—because my liens were filed at the time that Mr.—what do you call it—Mr. Watson held the property.

Q. I asked you a few minutes ago, Mr. Reilly, if you hadn't told Mr. Halton that the alternative to Halton Tractor Company paying the taxes was that the government would seize and sell the property. A. I did not.

Q. You did not? A. No.

Q. I read you from this report to Robert Valde, dated October 14th, 1953, "Because of conversations with him"—referring to Mr. Halton—"he"—Mr. Halton—"realized that were I to seize and sell the property owned by Lloyd Watson [144] under existing liens that quite possibly he"—the plaintiff—"would never have had no funds made available to him to satisfy his claim."

A. That's right.

Q. Does that refresh your recollection?

A. Yes. But that's not telling Mr. Halton that—make a demand on him for the payment of it or I would sell it, the property.

Q. I asked you, sir, didn't you tell Mr. Halton that the alternative to Halton Tractor Company

(Testimony of Francis J. Reilly.)

paying the taxes was that the government would seize his property and sell it?

A. I didn't tell Mr. Halton the alternative was—I said that if the taxes were not paid—I didn't say by Mr. Halton—I said if the taxes were not paid that the government could seize the property and sell it.

Q. That is what you told him?

A. That is what I told him.

Q. And you didn't use the word "equity" either when you told him that, did you?

A. Probably not.

Q. Probably not. And is this statement contained in your report correct, Mr.—

A. As far as I know, yes.

Q. Yes.

Mr. Blackstone: What is the date of that? [145]

Mr. Sharff: April 14th, 1953.

Mr. Blackstone: What paragraph are you reading from?

Q. (By Mr. Sharff): Paragraph 8. I don't know why, it coincides with my birthday.

Mr. Reilly, other than the yellow piece of paper received in evidence here as Plaintiff's No. 4, did you serve any other paper such as a warrant of restraint, notice to withhold, or notice of levy upon Halton or the Halton Tractor Company?

A. No, sir, I did not.

Q. And I presume your answer would be the same in regard to Wes Durston, Inc., wouldn't it?

A. Yes, sir.

(Testimony of Francis J. Reilly.)

Q. All right. Mr. Reilly, please search your memory on this point. Didn't Mr. Halton at some time during these conversations ask you if he didn't have some remedy or way to get the money back that he paid to the government?

A. I don't recall if he did.

Q. It could be that he did, though, couldn't it?

A. No. I think I would recall it. I have been searching my memory for a long time on this case.

Q. And you are quite certain as you sit there that Mr. Halton at no time asked you what relief he had to recover back that money?

A. No, sir, I don't recall it.

Q. You have known Mr. Halton for a long [146] time?

A. Long time, yes, sir.

Q. And you regard one another as neighbors, don't you?

A. Yes.

Q. And Mr. Halton regarded you in that nature, didn't he?

A. I presume so.

Q. And Mr. Halton's reputation in the community where you reside is for truth, honesty and integrity, isn't it?

A. Very high.

Q. And in telling him you had that in mind, didn't you?

A. Right.

Q. Mr. Reilly, prior to the trip to Los Banos, did Mr. Halton make any suggestion in regard to selling this equipment to him or repairing it and selling it?

A. I don't think so, no, sir.

Q. You don't think——

A. It was afterwards.

Q. It was afterwards?

A. Yes, sir.

(Testimony of Francis J. Reilly.)

Q. I call your attention also to this report, sir—suppose you read paragraph 7 also, Mr. Reilly; it has some questions about that.

The Court: Well, while he is reading it, Mr. Sharff, how much longer is cross-examination going to take?

Mr. Sharff: Not over five minutes, your Honor. I am sorry, your Honor, but I thought we wanted to accommodate the [147] witness.

The Court: Yes, I do want to accommodate the witness, but I also don't want you to cut off cross-examination that is important.

Mr. Sharff: Yes, sir.

The Court: But I am not going to extend this thing over any undue length of time. If necessary, we'll just have to keep the matter here until tomorrow.

Mr. Sharff I can assure your Honor I don't like working past 4:30 in the courtroom.

The Court: It's not only that: There are other things that have to be done as you well know and I want to get this matter disposed of if I can. But the main thing I want you to know if necessary I will hold Mr. Reilly here until tomorrow.

Q. (By Mr. Sharff): Well, I don't want to discommode him. Mr. Reilly, isn't it the fact that in your report—if I can hasten this up—you said that Halton proposed to you that if he be allowed to repair it and sell it prior to the time you went to Los Banos—

A. No, sir; I don't see it in this report here.

(Testimony of Francis J. Reilly.)

Q. It isn't?

Seven reads——

A. That's right. "Plaintiff proposed to me that if he were permitted to move the equipment to his own property and [148] repair it and later sell it, he would contact me to pay the tax owed by Lloyd Watson in full."

Q. And then in paragraph 8 you say: "After the equipment was moved to the premises"—that is, of the plaintiff—"I posted notices on each piece of equipment." Doesn't that refer to a later date or do you understand your letter——

A. You misunderstand my letter.

Q. I am sorry if I do. You didn't mean to say it was at a later date; is that what you are telling us?

A. Yes, sir.

Q. Tell me, Mr. Reilly, when property is in the possession of a third party, don't you usually serve documents such as a warrant of restraint or notice to withhold on them?

A. No, sir. The warrant of restraint is issued against the person owing the taxes. Then if we should have to sell, we notify the person holding any mortgages or any other equity in it. But first we must take an inventory of the property. Then after taking the inventory of the property and finding that out, if we don't think that we can get enough out of it to pay off that mortgage, if that mortgage was prior to our lien, we would not even touch it.

Q. You haven't answered my question.

(Testimony of Francis J. Reilly.)

A. Well, I tried to.

Mr. Sharff: I asked you. I asked the answer go out as not responsive. [149]

The Court: I won't strike the answer, but you can reask the question.

Q. (By Mr. Sharff): Don't you receive some paper or document on the third party in possession of the property of the taxpayer? Isn't that the usual course of procedure?

A. Oh, serve a levy, yes, sir.

Q. You serve a levy?

A. That's right, sir.

Q. And is it notice of levy?

A. A notice of levy.

Q. And did you serve that on Mr. Halton?

A. I did not.

Q. You did not? A. No, sir.

Q. Do you have a copy of that form with you, sir? A. No, sir, I don't.

Mr. Sharff: Could it be supplied to counsel?

Mr. Blackstone: Oh, yes, of course, we can supply a notice of levy. I can't see what is the purpose of that. I mean, you want to examine it?

Mr. Sharff: That's right, sir. We would like to show that the letter was mailed him promptly. It's very simple, believe me.

Q. Mr. Reilly, you stated that Mr. Watson—Mr. Halton made a proposition that he be allowed to repair the equipment and [150] sell it, and then the taxes be paid. In that conversation, was anything said as to who would get the first—well, we'll

(Testimony of Francis J. Reilly.)

use the slang term, "sellers take" out of the proceeds? A. No, I don't think there was.

Q. You didn't get that far?

A. We didn't get that far.

Q. Mr. Halton did tell you that if the property were sold in its present condition that it would bring a fraction of its value, didn't he?

A. That's right; yes, sir.

Q. Well, can you tell us how it happened that you did not find the Morris Plan mortgage in your search of the indices of the Court?

A. No, I can't tell you.

Q. That is, of the County Recorder.

A. I must have overlooked it, if it was there.

Mr. Sharff: I think that is all.

Mr. Blackstone: I just have two questions, or three.

The Court: Yes.

Redirect Examination

By Mr. Blackstone:

Q. Can you explain your understanding of the procedures of collection work of the Internal Revenue Service? Insofar as serving a notice of levy is concerned, on third persons other than the taxpayer, Mr. Reilly? [151]

A. Yes, sir. If we have a warrant on an individual who owes taxes, that warrant is issued by the Department. We find out if that individual—we go to him first and give him the notice of the war-

(Testimony of Francis J. Reilly.)

rant and ask for payment. If he cannot pay it and we find out he has any property or salary or wages coming to him, we go and make out the levy which we have in our office, which is already signed by the Director of Internal Revenue. And we serve that on the party that either holds any interest that this taxpayer has demanding payment from that third party of any interest that the taxpayer would have with the third party such as salaries, wages, or equipment or anything else, that they would be holding.

Q. Can you explain why you did not give a notice of levy to Mr. Halton in this case?

A. That's right. Mr. Halton is a respectable businessman and when he said he would pay the taxes I saw no reason to give him a levy.

Q. I should like also to ask you, Mr. Reilly, if you could perhaps—the point that was brought out on cross-examination, this letter of April 14th, 1953, where was it your understanding this property was to be taken for repair purposes? Was that at Los Banos?

A. No, sir; Merced. It was to be taken to Merced, as I understood it.

Q. So when you stated, "The plaintiff proposed to me that [152] if he were permitted to move the equipment to Los Banos and repair it," were you referring to the movement from Los Banos to Merced?

A. Los Banos to Merced, yes, sir.

Mr. Blackstone: I see. I think that is all.

(Testimony of Francis J. Reilly.)

Recross-Examination

By Mr. Sharff:

Q. Mr. Reilly, I don't want to be argumentative—and I say that to the Court—but the fact that Mr. Halton is a respectable and honorable businessman, did you understand that under the law that that relieved you of following the normal legal proceedings to levy upon property in the possession of a third party?

A. Yes. If somebody promises to pay me, I don't go and levy on them.

Q. All right. But when did Mr. Halton—withdraw that.

It was on the occasion of your third visit to Mr. Halton that he—and after your telephone call to San Francisco, wasn't it—that then Mr. Halton for the first time said he would pay the taxes, isn't that right?

A. Mr. Halton told me that he would sell—if he was allowed to take the machinery from Los Banos to Merced and overhaul it and sell the machinery——

Q. Yes?

A. That he would pay the taxes that Lloyd Watson owed.

Q. After he sold it? [153]

A. No. I told him that he would have to pay the taxes before he sold it.

Q. Well, the Court questioned you on this very

(Testimony of Francis J. Reilly.)

same point, Mr. Reilly. Probably I am confusing you or probably one of us is confused. I understood you to say that Mr.—and correct me if I am wrong—or the rest of us are wrong—that Mr. Halton's proposition was that he be allowed to repair the equipment and sell it and then pay the taxes from the proceeds.

A. That was his first proposition.

Q. Yes. And what did you say to him right then, right there?

A. I told him that I couldn't do that because I would have to have the taxes first.

Q. You told him that right then?

A. Right then. But I said I would also have to get permission from the San Francisco office to do anything.

Q. You mean you would have to get permission from the San Francisco office to accept the money?

A. No.

Q. Well, what then, please? Explain it to us.

A. To allow him to move the machinery and fix it up from Los Banos to the Merced yard.

Q. Well, I am sorry; I am rather dense, I guess. If Mr. Reilly—if Mr. Halton paid the taxes, what was there preventing him from moving it to Los Banos or to Merced or from [154] Timbuctoo, not to be sarcastic?

A. But he didn't pay me the taxes. If Mr. Halton sat down and wrote out a check for the full amount which he didn't even know what it was

(Testimony of Francis J. Reilly.)

because I hadn't set up all the records as yet, everything would have been over with.

Q. Then isn't it the fact that you phoned San Francisco to see if it was permissible for Mr. Halton to move the equipment from Los Banos to Merced and repair it and sell it before the taxes were paid; isn't that what you phoned San Francisco for?

A. No, sir.

Mr. Sharff: That is all.

The Court: Any further questions?

All right. Mr. Reilly, step down.

Now, gentlemen, that concludes the testimony so far. We will have to go forward at 10:00 o'clock in the morning. About how many witnesses do you have?

Mr. Sharff: I only have the one witness, Mr. Halton's bookkeeper, your Honor. And the question of how lengthy his testimony will be will be a question of how much foundation Mr. Blackstone wishes me to lay for his testimony for the exhibits I have to offer and how much his cross-examination will be of Mr. Bostick.

The Court: Mr. Blackstone, do you have any other witnesses? [155]

Mr. Blackstone: No. I have the certificate of assessment and payments, just to plead the case and some of the documents, but no witnesses.

Mr. Sharff: Just a second. One of my clients wants to speak to me before I release Mr. Reilly.

The Court: Yes. Well, we will be at recess until 10:00 o'clock tomorrow morning.

Those notices, the assessments——

Mr. Blackstone: Notice of levy.

The Court: Notice of levy that you have—now, I am not talking about the form. You say you have some documents here?

Mr. Blackstone: Well, it's a certificate of assessments and payments to show the taxes were in fact assessed against Mr. Watson and the payments.

The Court: I think you will stipulate to that.

Mr. Sharff: Stipulate to that, your Honor.

Mr. Blackstone: Well, all right. That, of course, is a necessary element in our defense, that the taxes were lawfully assessed and nothing——

Mr. Sharff: We will stipulate the taxes were due, your Honor. But we don't believe that Mr. Halton wanted to donate this much money to the government.

The Court: That is the very reason we are here. I am not asking you to stipulate to that. All I want to know, so the record is complete on the [156] matter——

Mr. Blackstone: I want to be clear——

The Court: Well, yes, of course, Mr. Blackstone, you are entitled to that.

We will be at recess until 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken to tomorrow, March 10, 1955, at 10:00 o'clock a.m.) [157]

March 10, 1955, 10:00 A.M.

The Clerk: Halton Tractor, Durston, Inc., against the United States for further trial.

Mr. Sharff: Ready.

Mr. Blackstone: Ready, your Honor.

The Court: All right. Call your next witness.

Mr. Sharff: Yes, your Honor.

Before putting the next witness on the stand, it occurred to me this morning that it might not appear from the evidence as it stands at this stage, and possibly a stipulation could cover it, why, during the period of 1947 when C.I.T. Corporation held this conditional sales contract Mr. Durston was pressing Mr. Watson for payment of the tractors. Does your Honor follow——

The Court: No; I don't.

Mr. Sharff: Mr. Durston testified yesterday that in the summer and fall of 1947 he contacted Mr. Watson on numerous—several occasions and asked him whether he would bring the payments up to date. And during that time——

The Court: You mean that is on the contracts?

Mr. Sharff: Yes. During that time, however, your Honor, it appears from the evidence that C.I.T. Corporation was actually the owner of the contract.

Now, Mr. Durston would testify that C.I.T. Corporation [158] was calling him and pressing him and he in turn therefore was pressing Mr. Watson.

The Court: Well, do you need testimony on that?

Well. I mean, isn't it standard form?

Mr. Sharff: Standard form of procedure; yes, your Honor. But I thought it might be considered some gap in the evidence. Therefore, I wanted to clear it up. Will you stipulate that was the fact, that Mr. Durston was being pressed by the C.I.T. Corporation and that was the reason in turn he pressed Mr. Watson as he testified?

Mr. Blackstone: He was being pressed on his guarantee?

Mr. Sharff: Yes.

Mr. Blackstone: Well, I will stipulate to that. I assume he would so testify.

Mr. Sharff: Yes; he would.

The Court: All right.

Mr. Sharff: I thought there might be a gap in the evidence, your Honor.

Mr. Bostick, will you take the stand, please?

FRANK BOSTICK

called as a witness on behalf of the plaintiff; sworn.

The Clerk: State your full name for the Court and record.

A. Frank E. Bostick.

Q. Spell your last name. [159]

A. B-o-s-t-i-c-k.

Direct Examination

By Mr. Sharff:

Q. Where do you reside, Mr. Bostick?

A. Merced, California.

Q. What is your business or occupation?

(Testimony of Frank Bostick.)

A. I am office manager for Halton Tractor Company.

Q. What is your usual occupation, sir?

A. An accountant.

Q. And how many years have you been an accountant? A. Since 1942.

Q. Now, how long have you been employed by Halton Tractor Company in the capacity of office manager? A. Since February, 1949.

Q. In the course of your duties, are the records of the Halton Tractor Company, a corporation, under your direction and control?

A. They are.

Q. Now, have you brought a number of those records to the courtroom here with you?

A. Yes; I have.

Q. And do they relate to the transactions between Halton Tractor Company and Mr. Lloyd Watson? A. They do.

Q. Do they cover the years of 1947 and '48?

A. Yes; they do. [160]

Q. All right. Now, do you have any record which shows, or from which you can tell us the amount that was due under the conditional sales contract, heretofore received in evidence as Plaintiff's No. 1, as of the date of January 31st, 1948?

A. I have actually two records. I have a memo, which I have taken from the original records, plus the original inventory cards, which with the allocations were made from the monies accredited to Mr. Watson.

(Testimony of Frank Bostick.)

Q. Monies credited or money due from him?

A. Due from him.

Q. Yes. Do you have those inventory cards with you?

A. Yes; I do.

Q. How many are they in number, sir?

A. Well, they are approximately 12.

Q. Approximately 12?

A. That covers that—14, sir.

Q. 14. Well, now, Mr. Bostick, will you tell us what pieces of equipment they cover—or rather, probably we can expedite this. I show you a statement, Mr. Bostick, and I ask you if you prepared this.

A. Yes; I did.

Q. And did you prepare it from the records of Halton Tractor Company under your possession and control?

A. I did.

Mr. Sharff: I ask it be marked for identification at [161] this time. I will hand you another copy for your use, Mr. Bostick.

The Court: Plaintiff's 10 for identification.

(Whereupon, summary of inventory items was marked Plaintiff's Exhibit No. 10 for identification.)

Q. (By Mr. Sharff): Would you tell us, Mr. Bostick, if the inventory cards you have here cover all of the items found on Plaintiff's No. 10 for identification?

A. They do.

Q. Do they cover the Ford pickup and the Chevrolet coupe?

A. They do.

Q. All right. Now, the inventory cards, what do

(Testimony of Frank Bostick.)

they cover in the way of records of the Halton Tractor Company, or what do they show?

A. They cover the initial costs plus the amount of repair work done on the equipment.

Mr. Sharff: Your Honor, I think it might be helpful for the court in following the testimony if your Honor took one of these exhibits.

The Court: Yes.

Q. (By Mr. Sharff): Now, let us go first to the matter of column No. 4, which you have headed, "Initial Cost," and which you have a total of \$48,496.10. Will you tell us how you arrived at that total, sir?

A. Yes. These totals are comprised of the balance due [162] under the conditional sales contract plus interest, the balance due on the mortgage plus interest, the amount of the checks paid to the United States government, one in the amount of 2,200 and the other in the amount of \$7,777.97.

Q. From what source did you take the figures of the initial cost, Mr. Bostick?

A. They were taken from two sources. The first was a general entry in our books in which we made an entry crediting Mr. Watson and charging our inventory for the amount due under the mortgage and the conditional sales contract, principal and interest.

The second item was from the checks which were charged directly to our asset account and used equipment.

Q. Is the information also found in columns—

(Testimony of Frank Bostick.)

rather, set forth in column 4 under "Initial cost" also shown on the inventory cards which you have in your possession here in court?

A. Yes; they are.

Q. Can you tell us from these records what was the amount due on the conditional sales contract as of January 31st, 1948?

A. May I refer to my notes?

The Court: Certainly.

The Witness: The conditional sales contract balance due January 31st, 1948, principal [163] \$14,594.06.

Q. (By Mr. Sharff): What was the balance due under the Morris Plan chattel mortgage?

A. \$23,000 even.

Q. And you added interest to that, did you?

A. Interest accrued to date on both instruments. The interest due on the conditional sales contract at that date was \$351.78, interest due on the instrument secured by the mortgage \$562.27.

Q. Now, let's understand that. The total of \$48,496 under Initial Cost is then the total of the balance due on the chattel mortgage with interest, the balance due on the conditional sales with interest, plus the money paid to the United States Government; is that correct? A. That is correct.

The Court: May I ask this question, then: When you say the chattel mortgage, which chattel mortgage are you talking about?

A. That is the Morris Plan chattel mortgage, your Honor.

(Testimony of Frank Bostick.)

Q. All right. That is the one that is Exhibit No.—let's see what number that is.

A. I am sorry. It's the second one.

Q. Is the chattel mortgage of October, 1947?

Mr. Sharff: Yes.

The Court: All right.

Q. (By Mr. Sharff): Now, that information all appears on [164] the inventory cards; is that correct? A. Yes; it does.

Q. All right. Now, let's go on.

The Court: I want to ask another question.

Mr. Sharff: Certainly, your Honor.

The Court: In this column under Initial Costs, I see no entries for the amounts pledged to the government.

The Witness: I might explain to your Honor that the way we did this, we credited or used the inventory account, which is a control account, for the entire amount of the credit allowed Watson plus the checks, and then reallocated the amounts.

Q. Well, the initial cost is based upon a reallocation? A. That is correct.

The Court: All right.

Q. (By Mr. Sharff): Tell me this. The first column you have here is "Dated Received," and I see 1/31/48. Can you explain—does that entry come from the inventory cards? A. Yes; it does.

Q. In other words, the inventory cards show this equipment all received as 1/31/48? A. Yes.

Q. And the "Description" in the next column is taken from the inventory cards?

(Testimony of Frank Bostick.)

A. Yes. [165]

Q. All right. Now, we go to the next column, "Repairs in Halton Shop," and we have certain items there under that column. Will you tell us from what source or sources that information was obtained, and are the original records thereof in the courtroom?

A. The source of this—these amounts are from original job cards covering the cost of the work performed in reconditioning this equipment. I have a portion of the original document in the courtroom today. The portions covering the work done in Merced were destroyed about three years ago due to a space limitation of our storage facilities. Unfortunately, I never realized that I would ever need them. But I do have the records from Los Banos.

Q. Are we to understand that you are testifying that the records of the Halton Tractor Company, part of its repair work, was done at Los Banos and part of it at Merced? A. That is correct.

Mr. Blackstone: Is that based on personal knowledge?

Q. (By Mr. Sharff): Well, what Mr. Blackstone wants to know is on what you base that.

A. I don't quite understand your question. Do you mean whether it was done at Merced?

Mr. Blackstone: I mean, if you see it done. That is what I was concerned with.

A. I wasn't concerned with it at that time. However, our [166] records are identified as to location of the work done.

(Testimony of Frank Bostick.)

Q. I see. You are basing that on the records?

A. Yes; that is correct.

Q. (By Mr. Sharff): Now, you have here, I believe, in court, the records of the work at Los Banos; is that correct?

A. That is correct. These are the original records of the work performed.

Q. All right. Now, in those cases where the work was done at Merced, from where have you taken the figures which you have put under the column, "Repairs"?

A. They were taken from an internal journal to which these documents are posted in the normal course of operations.

Q. I see. Well, now, the column, "Total cost of sales," that is a total, is it, of initial costs plus repairs? A. That is correct.

Q. Now, then, you have "Sold for," and to whom it was sold and the date. From what records did you obtain that information?

A. From the ledger cards; also, the information as set out in the inventory cards.

Q. The inventory cards are here in court; is that right? A. They are.

Q. Now, in other words, as we read here then, these were sold for \$57,000, the total of this equipment was sold for \$57,807.97; is that correct? [167]

A. Correct.

Q. All right. Now, you have an item here at the bottom, "Sales Department Operating Expenses."

(Testimony of Frank Bostick.)

\$7,931.25. From what source did you obtain that information?

A. I obtained that information from our annual financial and cost analysis by taking the total operating sales department expense and arriving at a percentage covering the total sales for the year, and applying that percentage to the gross amount of the sales, this figure, \$57,807.97.

Q. Now, is the original record from which you took your total cost of sales and the amount of sales here in court?

A. Yes; it is.

Q. It is?

A. I have that here.

Q. All right. Now then, "B" is the item of the taxes which were paid to you by Durston; isn't that correct?

A. That is correct.

Q. Yes. And stating the initial costs shown in column 4, sir, you did not put it in the \$3,900?

A. No; I did not. It was received after the original transaction had taken place.

Q. I see. Now, you have under "C" here, "Potential profit on basis of sales of used equipment"; what do you mean by that, sir?

A. Working back in the statement for the year, 1948, I took [168] the gross sales of used equipment less the cost of sales of used equipment, and arrived at a percentage of gross profit. From the gross profit percentage—or excuse me, from the total sales of used equipment, I deducted out the transactions covering the Watson equipment to arrive at the next transactions exclusive of the Watson equipment, and arrived then at a gross profit figure.

(Testimony of Frank Bostick.)

Q. You mean a gross profit percentage?

A. Gross profit percentage.

Q. Will you tell us what that gross profit percentage was?

A. Yes. That gross profit percentage was 16.52 per cent. From that I deducted the percentage which was developed in allocating the sales department operating expense to arrive at the net profit percentage on operations of 1948 in the sales of used equipment, and arrived at a 2.80 per cent net profit.

Q. In other words, you have used here a profit figure of 2 point what, sir? A. 2.8.

Q. On a dollar's worth of sales, is that correct, on used equipment? A. Yes.

Q. And that is the figure which reaches \$1,618.62, is that correct?

A. Yes. The 2.8 per cent was applied to the \$57,807.97 to [169] arrive at the figure of \$1,618.62.

Q. Right. Now, those figures, I believe, were taken from the original records which you have here in court, is that correct? A. Yes.

Q. All right. Now, the next item, "D," is "Interest accruing under conditional sales agreement and mortgage"? A. That is correct.

Q. Did you figure that under the October mortgage or the Morris Plan mortgage?

A. I believe it was the Morris Plan mortgage; Morris Plan mortgage, yes; plus the conditional sales contract.

(Testimony of Frank Bostick.)

Q. And to what date did you figure that, sir?

A. I applied that to the balance of the equipment as it was held in inventory until the period it was sold. In other words, it's an allocated figure. I have the schedule here for exhibit.

Q. You have?

A. It's quite a computation. It's a little bit difficult to explain.

Q. In other words, what it amounts to is interest in each piece of this equipment until it was sold on the date shown in the last column; is that correct?

A. That is correct.

Q. Now, the last item here is "E," "Difference between [170] actual overhead and base rate charged (shop overhead only)"?

A. That is correct.

Q. Now, what does that refer to, Mr. Bostick?

A. In the year, 1948, we used and applied overhead rate of \$1.15 an hour. Rather than compute our overhead rate for the shop monthly, which would be very difficult, we make an estimate of the original the first part of the year, ordinarily, based on the last year's operations, and establish what we feel to be an equitable rate. We use that as our applied overhead all year.

At the end of the year when we draw off our final financial and cost statements, we develop the actual overhead. The actual overhead in this case was \$1.33 an hour rather than \$1.15. The amount of \$276.89 represents the difference applied to the total number of hours of work done in repairs, which is

(Testimony of Frank Bostick.)

column 5, I believe. In other words, the cost as set out in the repairs in the Halton shop, an overhead rate of \$1.15 was charged, where the actual incurred overhead was \$1.33. This \$276 makes up the difference.

Q. Now, then, your total cost and expenses counting in a potential profit of 2 point some per cent was the amount of \$62,875.50; is that correct?

A. That is correct.

Q. And which leaves a loss to Halton Tractor Company of how much, sir? [171]

Mr. Blackstone: I object. I object to that question. There can't be a loss if you are bringing in profit.

Mr. Sharff: Well, I mean uncovered cost and revenue loss.

Mr. Blackstone: I think right now I can move to strike from this exhibit this item "C" here, potential profit. We are only talking about, as I understood it, costs here. Adding a potential profit as an item of expense completely mystifies me under my legal theory.

Mr. Sharff: Well, your Honor, it doesn't me. If a liquidator, an auctioneer, has handled the disposal of this equipment, he would have charged a fee for doing it. But I believe under the prevailing rate, it would have been five to ten per cent, sometimes as high as 25 per cent.

Now, Mr. Halton went into this transaction hoping to make a profit from Mr. Watson in selling him new equipment. This was thwarted by the acts of the Government here. Certainly he is entitled to

(Testimony of Frank Bostick.)

recover the normal rate of profit if for no reason else than this, your Honor: that Mr. Halton could certainly have sold other used equipment and for which he would have had a normal rate of equipment—normal rate of profit—to the same customers.

The Court: I don't—I mean I don't so understand it. Actually all he was doing, anyway, was selling the property, and if he could make a profit for Watson, he would have. [172]

The fact that the taxes are involved, the Government is just standing in Watson's shoes in that respect. Now, if he couldn't have charged this item against Watson, he can't charge it against the Government.

Mr. Sharff: Well, he certainly would have made a profit in the transaction, contemplated a profit, your Honor. Certainly Mr. Halton is not to be asked to do all this work for nothing, your Honor. He is not in business for his health. It seems to me that he should be——

The Court: You mean when he made a bum business deal in the first place he is supposed to make a profit on it?

Mr. Sharff: It wasn't a bum business deal in the beginning, your Honor.

The Court: Well, I am not saying he is a bad business man. But it turned out to be a transaction in which it was necessary to make a repossession, and he had to go through what, if I may use for want of a better term, a salvage operation.

Mr. Sharff: That is just the point. Your Honor

(Testimony of Frank Bostick.)

has hit it right on the head. This did not start out to be a salvage operation. Mr. Halton took it on the basis of selling it to establish a credit on the books for sale of new equipment; the Government stepped in and it became a salvage operation, as your Honor termed it.

The Court: Well, the basic point I am making is—no, [173] I don't think that is true. I don't think it changes the operation insofar as Mr. Halton is concerned from a salvage operation at all. It was a salvage operation in every instance. He was going to make as much as he could, and the question I want to know is: Do you contend that this item could have been charged against Watson?

Mr. Sharff: Not on the original agreement. But the original agreement was destroyed by the Government's actions.

The Court: Which original—are you talking about the——

Mr. Sharff: The December conversation with Mr. Watson, your Honor.

The Court: Well, I don't know whether I can agree with that. But I don't want to decide that until I come to the point. I am not going to rule immediately on the motion to strike, Mr. Blackstone, because I want to hear more about it.

Mr. Blackstone: Well, I wanted to make the objection.

The Court: Well, you certainly have a right to, and I want you to when you come to the cross-examination, develop the matter but as you think it

(Testimony of Frank Bostick.)

should be developed. But what I am principally interested in, and what Mr. Sharff is doing, is giving the basis for all of the charges.

Now, I gather here that the purpose of this testimony is to determine what if anything was left to Mr. Watson.

Mr. Sharff: That is correct, your Honor.

The Court: And your purpose was to show that there was [174] not?

Mr. Sharff: That is right, your Honor. That is exactly it. And I think, acting as a liquidator, he was entitled to a reasonable fee as a profit for his services, not just an operation for expenses. That's one of the theories under which I think the Court should consider the matter. If he is acting as a liquidator, he is entitled to the profit as a liquidator, the way the transaction came out.

Your Honor, I ask that Plaintiff's Exhibit No. 10 for identification now be received in evidence as Plaintiff's Exhibit No. 10.

The Court: Well, it will be admitted into evidence. But the validity of some of the items that are entered thereon will have to wait. That will have to be determined. The fact that it is in evidence is simply that it is a computation made by this witness based upon the records. I will admit it as such.

Mr. Sharff: You may cross-examine.

(Whereupon, the Plaintiff's Exhibit No. 10 formerly marked for identification was received in evidence.)

(Testimony of Frank Bostick.)

Cross-Examination

By Mr. Blackstone:

Q. Now, Mr. Bostick, this column on your Exhibit 10, "Initial Cost," you say that that information is taken from the inventory cards, these 14 cards that you [175] mentioned?

A. These 14 cards summarize it, the information.

Q. Well, I wondered—may I look at those inventory cards?

A. Certainly. The amount and the initial cost column there ordinarily will be the first figure on the card.

The Court: You made the allocation on the inventory card?

A. The inventory cards are a result of the calculation, your Honor.

Mr. Sharff: Does your Honor wish to inspect one?

The Court: No.

Mr. Blackstone: May I have this marked as an exhibit so it will be clear in the record?

The Clerk: Defendant's Exhibit E.

Mr. Sharff: That covers which tractor?

Mr. Blackstone: I will read it as soon as it is marked.

The Court: All right. Defendant's Exhibit next in order.

The Clerk: E.

The Court: Defendant's Exhibit E.

(Testimony of Frank Bostick.)

(Thereupon, the document referred to above was marked Defendant's Exhibit E for identification.)

Mr. Blackstone: I have had marked for identification an inventory card, Defendant's Exhibit E for identification. It relates to DW Tractor IN2581. Now, I don't think there [176] will be any objection if I also identified this tractor as being one that is covered by a mortgage of chattels dated October 2nd, 1947, which is Defendant's Exhibit A, isn't it?

The Court: I think it is.

Mr. Blackstone: Will there be any objection if I stand next to the witness here and go over the card with him?

The Court: No; of course not.

Mr. Blackstone: If you would like to come up, too, Mr. Sharff.

Mr. Sharff: I will be there in a moment, as soon as I——

Mr. Blackstone: All right.

Mr. Sharff: Go ahead, Mr. Blackstone, I am sorry.

Q. (By Mr. Blackstone): You have on this card under column entitled "Date received," 1/31/48. Now, is it your understanding that the card was made up at that time, on that date?

A. Excuse me. I wasn't with the firm at that time. However, being familiar with the procedure, I would state that it was my opinion that it was.

(Testimony of Frank Bostick.)

Q. And would that indicate the date that the company considered the equipment received at its plant?

A. Not necessarily. This is the date that the transaction crediting Watson's account and charging our asset account used inventory took place.

Q. In other words, the equipment would have been received by that date? [177]

A. That is right.

Q. This equipment had been sold or was subject to a chattel mortgage, was we stated, or as I stated before, and it is one of the items shown on Defendant's Exhibit A? Is there a prior card for this tractor?

A. Not that I am aware of. I don't see where there would be, actually.

Q. This is the first card, then, relating to that tractor?

A. As far as—let's see—now, originally I believe we sold this to Watson.

Q. Well, you don't know of your own knowledge, and you don't know, or you do know, that this is the only card relating to this tractor that is in the records? A. Affecting this transaction; yes.

Q. And the date received, does that refer to the date the tractor was received?

A. No; in this case the date refers to the date of the entry.

Q. There is a column that says "Purchased from" and it says, "Lloyd Watson." There is a

(Testimony of Frank Bostick.)

column then that says "Cost" and it has "February, \$9,000." Where did that item come from?

A. This February refers to this job, Mr. Blackstone.

Q. Underneath the entry "February" there appears "Job No. 3988." A. Right. [178]

Q. And an entry \$177.88.

A. Now, the \$9,000, where did that figure come to apply on this card? That came from the allocation of the initial cost transaction, as I understand.

Q. Taking the amount outstanding under this second chattel mortgage, Defendant's Exhibit A, and taking the amount outstanding under the conditional sales agreement, is that correct?

A. Plus interest accrued on both instruments, plus.

Q. So that date of January 31st, 1948, plus the two checks——

The Court: I want to know what you mean by both instruments.

A. The conditional sales contract and the mortgage, your Honor.

Q. Is it subject to conditional sales contract, too?

Mr. Blackstone: This tractor—no. He was telling how he arrived at this \$9,000 figure to apply on this one card.

The Court: Oh, he is allocating——

Mr. Blackstone: And he said he took the total amounts outstanding under these two instruments plus the amounts paid to the Government and——

The Witness: That is correct.

(Testimony of Frank Bostick.)

Q. (By Mr. Blackstone): Then how did you decide how much to allocate? Of course you did not do this? A. No; I didn't. [179]

Q. Do you know the form there that was used to decide that \$9,000 of this composite amount to be attributed to tractor DW-10 No. IN2581?

A. I am quite aware of the procedure used at that time. I might add, too, that that date was a retroactive date because, as we know, the two checks were written in February.

However, the transaction was made taking into account those checks, and entered in January on the last day of January. After the total amount had been determined, my predecessor, in all probability, was Mr. Halton and our sales manager, Mr. Brooks, took the information available and through their determination allocated the costs to these pieces of equipment on the basis of their knowledge of the condition and market for the particular pieces of equipment and their salability.

Q. It didn't then necessarily have any rational connection with the actual initial cost of this tractor, the amount that had been paid to the original seller of it, whoever that might have been?

Mr. Sharff: Just a moment.

A. I really couldn't answer that because you might have had a brand new piece of equipment that had been treated very hard and no repair work.

Q. (By Mr. Blackstone): Well, the most you could say was that it could or could not. But the

(Testimony of Frank Bostick.)

way your formula worked [180] out, you took a gross amount owing to the Halton Tractor plus the checks to the Government, and then tried to allocate it among the various items of equipment, I suppose—on the basis of which items?

A. Of estimated value at that time.

Q. Which items had been in better condition than others and which appeared to be of better value than others? A. That is correct.

Q. Then the next entry we have already identified under the cost column is Job No. 3988, \$177.88. What does that refer to?

A. That refers to—may I explain a little bit of the procedure, your Honor? It might clear a point here.

The Court: Yes.

The Witness: We post from this instrument—

Q. (By Mr. Blackstone): What instrument is that? A. That is a job card on which—

Q. For repairs?

A. That is correct, on which costs are accumulated, both labor, overhead and parts.

Q. Now, can you find job No. 3988 in there for me, please?

A. We have it right here. To go on with the procedure, the summary of this transaction—

Q. Would you wait just a minute? I would like to have this marked for identification, also.

The Court: All right, Defendant's Exhibit F for [181] identification.

(Testimony of Frank Bostick.)

(Whereupon, document referred to above was marked Defendant's Exhibit F for identification.)

Mr. Sharff: May I see it a moment, Mr. Clerk, please?

Q. (By Mr. Blackstone): Now, on Defendant's Exhibit F, I see two columns, one that has written in pencil "List" and under which are two entries, or several entries, "Labor, \$93.50; parts, \$106.41." "O period H."; what does that mean?

A. That is merely the abbreviation for overhead.

Q. And in that list column there is no entry for overhead then? A. No.

Q. And the total in the list column is \$199.91.

A. That is right.

Q. The next column is entitled "Net," and has "Labor, \$54.36; parts, \$79.82; overhead, \$43.70," and the total there is \$177.88.

A. That is right, referring to the——

Q. Referring to Defendant's Exhibit E. You then took, or the bookkeeper took the item under the net column, \$177.88, and placed it in this card. Would you explain what the difference is between the list entries and the net entries?

A. Primarily it's customers' rates; it lists the amounts that were charged for commercial work to customers. Net is our cost. [182]

Q. I see. And so you charged only costs?

A. That is correct.

Q. On these inventory cards? A. Yes.

Q. Looking at the actual breakdown of figures that come under the heading "Description," we find

(Testimony of Frank Bostick.)

the first entry January 26, "Description, changed tires; mechanic's number, 9." Does that identify the actual man who worked on the job?

A. Yes; it does.

Q. "Hours, 2." A. Yes.

Q. "List," it says, "\$5." A. Yes.

Q. Do I understand that that would be the charge you would make for labor to a customer?

A. That is correct.

Q. That would include profit, is that correct, then, to Halton Tractor?

A. Theoretically it should; we'll say it that way.

Q. It's more than what it actually cost you for labor?

A. I haven't analyzed for that particular year, so I really couldn't say.

Q. The net amount for these two hours' labor was \$3. Would that be the actual amount paid to the mechanic No. 9 for that job? [183]

A. It was apparently \$1.50 an hour; it would be his rate.

Q. Then may I ask, the particular description on this Defendant's Exhibit F of the work done simply is a labor cost, is that correct? It does not show parts?

A. That is correct. The parts are attached; the copies, parts, copies of the invoices are attached to the jobs.

Q. On the first page then is labor and the pink slips attached are the parts that were charged?

(Testimony of Frank Bostick.)

A. That's right. The summary of the entire transaction is set out here.

Q. Can you tell by looking at these pink slips whether the net price is shown thereon, or the list price, that would be the customer's charge for parts shown on the pink slips, or both? Would you refer to the first pink slip that you are looking at?

A. Yes. I am looking at a copy of invoice No. LB-66173, dated January 29th, 1948, for identification. It covers a large truck valve stem installed on a truck tube; labor is \$1.80 list, net is \$1.35. The identification of the account number up here indicates to me that it was done by an outside firm.

Q. And so that would be then included under the summary parts, is that it, and part of the——

A. Without adding them up——

Q. Even though—— [184]

A. I would say.

Q. Even though the first sheet you referred to is entitled "Labor," that was not included in the description of labor shown on the first page?

A. That's correct.

Q. Looking at the second pink sheet, Mr. Bostick, could you state——

A. We have on the distribution across the page a column entitled "Quantity," a column entitled "Part Number," a column entitled "Description," a column entitled "Account Number," a column entitled "Price," a column entitled "Amount." The first item set out here is "Quantity, 1." The part number is "T259."

(Testimony of Frank Bostick.)

Q. May I interrupt just a minute. All I wanted to find out is if you could tell from looking at this particular page if a list price is shown, that is, a price that is to be charged to a customer?

A. That is a list price. Q. \$13.25?

A. Less 25 per cent, which is our account on these particular parts; these reduced here, giving a total of \$9.94 net.

Q. Does that reflect the actual cost to Halton Tractor, or is that just a general way of figuring out what cost would be, or what does the 25 per cent deduction—— [185]

A. In our method of allocating costs we used the amount of 25 per cent off list to arrive at net. Through experience of many years, it might be a per cent or so, a fraction of a per cent one way or the other. We have on our pricing medium, as I recall, only the list price—no, it's not, either——

Q. Let me ask you then, the very first entry is the description. I can't read it. What is that?

A. That is a nut.

Q. The amount which would be the list price to a customer, 61 cents. Now, do you know what a nut would cost Halton Tractor? What did he pay for it?

A. Without referring to the pricing medium I couldn't tell you exactly what that particular nut would cost. I would say it would be very close to 75 per cent of this cost. It could be some 74 per cent, or it could be 75 and a quarter.

Q. And as far as parts was concerned, the practice of Halton Tractor Company is to simply add on

(Testimony of Frank Bostick.)

the 25 per cent charge over and above cost to make up just 25 per cent?

A. No. At Halton Tractor Company, we would take the list and reduce it by 25 per cent.

Q. That wasn't the question. I want to know from the cost what you actually paid for parts to the wholesaler or supplier or manufacturer, what is the markup? What is the difference between the cost and this price to your [186] customers?

A. Approximately 25 per cent.

Q. I see. Does it ever vary?

A. Very slightly. There are certain items where you get down to items that cost one cent or two cents, and they increase it by a cent. You have got 50 per cent increase on a one cent item or a fraction of a cent item. But that wouldn't tend to distort it enough to mention.

I might add that the method we used is generally accepted by Caterpillar distributors of comparable size.

Q. To market 25 per cent over cost?

A. The method which we used—now we don't. Our procedure is to take 75 per cent of list, not to mark up the cost.

Q. Yes; but you must know what your cost is. You must have to pay somebody something for that material that you sell.

A. That is correct.

The Court: How do you arrive at list?

A. From a pricing medium, your Honor.

Mr. Sharff: From what?

The Court: Who prepares that?

(Testimony of Frank Bostick.)

The Witness: Caterpillar Tractor Company furnishes us with that.

Q. (By Mr. Blackstone): Would it be that you have invoices relating to the parts shown here that would show exactly what Halton Tractor, in fact, paid for these parts? [187]

A. Oh, very definitely.

Q. Could they be obtained and submitted for my inspection? We wouldn't have to necessarily continue the trial unnecessarily; we may be able to stipulate to that. A. Certainly.

Q. Just for my information to check this matter of costs. Well, I think it's not necessary to go through each one of these cards because I am perfectly willing to stipulate that the cards were prepared in the same way. I just wanted to find out how it was done.

Now, then, the next entry on this Defendant's Exhibit E under the cost column is Job No. 4306.

A. Yes.

Q. I think I would like to have you dig out all of these relating to these particular cards.

A. I will have them for all the work that was done in Los Banos, and it's quite possible that—may I say this—Yes; all the work that was done on this was done at Los Banos with the exception of this one; this is a Merced job number.

Q. And you do not have the records from Merced? A. No; I don't.

Q. They have been destroyed?

A. That is correct.

(Testimony of Frank Bostick.)

Q. But as far as you know—— [188]

A. The Merced—the procedure would be the same.

Q. The same. And these repairs would be items shown on these cards, then, they would be net labor cost and the list price of parts reduced by 25 per cent?

A. Yes, that is 4109. You will notice this item here of \$10.02. Because of the insignificance of the amount I did not go back—this indicates February cash receipt of \$10.02—I didn't go back to see what that was. I assumed that there might have been a small item that would be the only transaction like it in the entire sequence of operation. I merely brought it up.

Q. That is some kind of an adjusting entry, is that the idea?

A. I assume that there might have been some scrap metal or something removed from it and sold for that amount, which they applied to credit to the cost.

Mr. Blackstone: I should like to have this marked as Defendant's next in order.

The Court: Defendant's Exhibit G, which is this——

Mr. Blackstone: This is the summary of the papers relating to repairs.

The Court: Is this new? Has it already been marked for identification?

Mr. Blackstone: This is new. This relates to the entries shown on Defendant's Exhibit E. [189]

(Testimony of Frank Bostick.)

The Court: All right. That will be Defendant's Exhibit G.

(Whereupon, summary of repairs referred to above was marked Defendant's Exhibit G for identification.)

Mr. Blackstone: That relates to job No. 4036, and we are still talking about it.

The Court: It's another job sheet?

Mr. Blackstone: And we are still talking about the same tractor, DW-10 IN2581.

Q. Mr. Bostick, in looking over Defendant's Exhibit G for identification, would you refer to the pink sheets there and explain why some of those pink sheets indicate labor on them?

A. The account number, which is set up here in the right hand side, account No. 1338, indicates that it was labor done on the outside; in other words, done by another firm. For instance, this is repairing a tractor seat. We have no upholstery facilities. We send that out. The title of our account is "Outside services," "purchased for this account 1338."

The Court: And this would then be, of course, a net figure \$5 that is out-of-pocket costs to Halton Tractor? A. Yes; that is correct.

Q. (By Mr. Blackstone): Would you look up another one of [190] these pink sheets dated March 5th, 1948, and explain that entry?

A. The tag reads, "5 pounds of bronze, 80 cents"—the price should be over one column. Five pounds

(Testimony of Frank Bostick.)

of bronze, \$4; labor, \$4.20. Apparently there was some machine work done.

Q. Is there any account number to show this was done outside the plant of Halton Tractor?

A. No; there isn't.

Q. Would the labor item there, then, be a labor item of Halton Tractor's own labor?

A. It's possible; but I believe that that would be outside work done. I would have to refer back to the requisition, if it were possible to find it, to actually identify it. I assumed that it was, because ordinarily we won't bill our own labor. It would be picked up over here in the job card.

Q. However, this particular one that I referred to did not have that item 133-A, which you said was the ordinary way of referring to outside work done.

A. Yes; it's a common practice to identify it by the account number.

Q. Here's one of the pink slips dated March 13th, 1948, which shows a net figure of \$5.07 and no deduction of 25 per cent. Could you explain why that is?

A. Yes. You will notice that that account No. 132, which [191] is other new parts, those are priced out at net. We have, as Mr. Halton said yesterday, represented the John Deere Plow Company and the Caterpillar Tractor Company, and we also carry an allied line of parts. The inventory title of this account is "Other new parts," which we price at cost. We refer back to the inventory record where we do have the cost set up.

(Testimony of Frank Bostick.)

Q. That already has been put down at cost?

A. That is correct.

Q. I see. Now, referring to Defendant's Exhibit G, the first page, you will notice, Mr. Bostick, under the "Hours" column, there is no hours shown that exceed eight hours, is that correct?

A. That is correct.

Q. Was overtime paid by Halton Tractor Company when a man worked less than eight hours a day?

Mr. Sharff: What was the question?

Mr. Blackstone: I asked if they paid overtime when a man worked less than eight hours a day.

A. On holidays there would be such provisions. I am not familiar with the labor arrangements with the organization at that time. I would assume that on holidays or on Saturdays overtime would have been paid.

Q. If overtime had been paid, would it not be shown in the "Amount" column, the last amount column being the net? [192] Actually, the Defendant's Exhibit G does not have shown on it the list and net. Would it be all right if that were put on in pencil simply to make it accord with Defendant's Exhibit F? Would you have any objection to that being done so that the exhibits will—I take it, Mr. Bostick, since the net column would reflect the actual payment paid to the mechanic who is shown as working on the job, if in fact he had been paid overtime, that would have been shown in the net column?

(Testimony of Frank Bostick.)

A. That is correct. However, it would have been set out in here. You will notice these items in red; anything other than straight labor is ordinarily set out—in other words, overtime would be set out separately. This happened to be one hour travel time. This would be steam cleaning, which is at a different rate; painting is at a different rate. So it would ordinarily have been set out.

Q. Now, referring to Defendant's Exhibit G you will note that——

A. Excuse me. May I show you here, here's one where overtime was charged, just to show——

Mr. Blackstone: Let's have it marked for identification if we are going to refer to it.

The Court: H. Defendant's Exhibit H. What is the purpose of this cross-examination, Mr. Blackstone? It may be interesting as to the system of bookkeeping. [193]

(Whereupon, the document referred to above was marked Defendant's Exhibit H for identification.)

Mr. Blackstone: Well, your Honor, I want to be sure that we have gotten simply costs in this—costs to Halton Tractor, because my theory is he is certainly not entitled to make a profit every step of the way here.

I think that insofar as this whole issue is concerned, really, we are not conceding even that the court has to get to it; but assume that they have reached this point, certainly the most they are en-

(Testimony of Frank Bostick.)

titled to, as far as we are concerned, is their actual out-of-pocket costs. They have added in that summary certain overhead, which I think I am developing right now. It is simply not justified. If we are talking simply about costs——

Mr. Sharff: I haven't noticed such items; probably I have been sleeping or——

Mr. Blackstone: I think we are going to get to it right this minute.

The Court: All right.

Mr. Blackstone: However, Mr. Bostick wanted to refer to Defendant's Exhibit H.

The Court: Well, how could overtime affect profit or anything of that sort unless there was——

Mr. Blackstone: Oh, I beg your pardon. I appreciate [194] your interrupting because what I had in mind—I was confused, I thought this overhead meant overtime, and so there I have been wasting some time. May I just take a moment to collect my thoughts here?

The Court: It would be a very good time for the recess. We will take our morning recess, anyway, but to me——

Mr. Blackstone: That is what I thought, that's what I was driving at.

The Court: ——but if you want to arrive at the overhead part of it, if there is——

Mr. Blackstone: Well, I do; yes.

The Court: If there is a profit in overhead—but I take it the overhead that he is charging is just overhead for expense of operation. I take it there

(Testimony of Frank Bostick.)

is a charge made on each job as a proportionate share of overhead based on some sort of a ratio or figure or formula that you have previously determined; isn't that correct?

The Witness: That is correct, your Honor.

The Court: And that is an expense of the operation?

A. That is correct. In other words, to arrive at our costs—actually what overhead is, or costs, it can't be specifically allocated, such as heat, light, water and power, depreciation and so forth. It couldn't be allocated directly to any one job. So our practice is to lump all of these expenses applicable to the operation of the shop together, [195] and divide it by the number of man hours to arrive at the cost per man hour. That is how this rate is arrived—the method of computation of this rate is arrived at.

The Court: It's a formula, and then you just apply it and save yourself——

The Witness: There are two factors involved, the direct labor and the overhead.

The Court: Yes. Now, as I say, the reason I ask this question, Mr. Blackstone, is I am as much concerned about the cost question as you are, but——

Mr. Blackstone: Well, I have been on the wrong track, your Honor, because I got confused and thought of overhead as overtime and I have wasted the Court's time. I apologize.

The Court: There is no problem in that. Any-

(Testimony of Frank Bostick.)

way, it's 11:00 o'clock and we will take our recess. If you want to check your figures, you can. We will see if we can cover this as rapidly as possible.

Mr. Blackstone: Mr. Bostick, perhaps we can shorten this up. I would like to have in evidence all of these detailed breakdowns of the repair jobs for the one tractor or No. IN2581. Now, we have identified exhibits——

The Court: F, G and H.

Mr. Blackstone: And H did not relate to that tractor. I don't believe it did. I will introduce that into evidence.

Q. Could you find—well, 4109 is the Merced repair job? [196] A. That is correct.

Q. And you won't have a record of 4109—is it Merced?

A. No; that is the Los Banos job, I believe. We had that 4109. Yes; that is this one. I believe the original job has already been put into evidence, 3988.

Mr. Sharff: That is the one for \$178, isn't it, Mr. Blackstone?

The Witness: Yes; that is this one. You see, these three jobs——

Mr. Blackstone: 4038—has this been marked for identification? Could that be marked?

The Court: All right. Defendant's Exhibit I.

(Thereupon, the document referred to above was marked Defendant's Exhibit I for identification.)

(Testimony of Frank Bostick.)

Mr. Blackstone: I would like to offer into evidence at this time Defendant's Exhibits E, F——

The Clerk: G?

The Court: G and I?

Mr. Blackstone: G and I.

The Court: Is there any objection? They will be admitted into evidence, in accordance with the letters with which they have been marked for identification.

(Whereupon, Defendant's Exhibits E, F, G and I heretofore marked for identification [197] were [received in evidence.]

The Court: That leaves H still marked for identification and it will not be admitted into evidence.

Mr. Blackstone: Yes.

Mr. Sharff: There is one qualification, Mr. Blackstone. If in our investigation some questions appear about the contents of these exhibits, I would certainly like the opportunity to present an explanation of the items.

Mr. Blackstone: I don't know what exception——

The Court: We will pass on this. I don't know what the answer is going to be.

Mr. Sharff: I don't either, your Honor. I can't anticipate the future either, so——

Q. (By Mr. Blackstone): The next part of this Plaintiff's Exhibit 10 that I should like to inquire about, Mr. Bostick, is item A, "Sales department operating expenses. \$7,931.25." Is it correct that

(Testimony of Frank Bostick.)

you took the total overhead expenses for the year and then arrived at some ratio to apply to the sales that are shown on this exhibit?

A. The sales department operating expense or operating expenses of the sales department itself—you realize we have a departmental cost breakdown, an expense breakdown. The base figures used in arriving at this computation were those expenses allocated to the sales department incurred directly and indirectly by the sales department. If I refer to my notes, I can give you the exact figures on the [198] basis of the computation.

Mr. Blackstone: Yes; please do.

A. For the year's operations, 1948, total sales attributed to sales department for \$1,397,478 omitting the cents; the total operating expense, direct and indirect, allocated to the sales department was \$191,689, which is 13.72 per cent of the total sales. I might add that these costs are not reflected in the shop overhead at all. There is no relation to them.

Q. And then you arrived at your figure of \$7,931 by taking 13.52 per cent of—

A. 57.

Q. \$57,807.97, is that correct?

A. That is correct.

Q. Could you explain to me why you included in your \$57,000 for this purpose the sales of the Chevrolet and Ford pickups which were not handled by Halton Tractor Company at all?

A. They were handled by us. We took—

Q. It's my understanding that, from the testi-

(Testimony of Frank Bostick.)

mony of Mr. Halton, the McAuley Motors made the sales. Do you have any independent knowledge of those sales?

A. I do not. They did handle the sales. However, we took them——

Q. I think that answers my question. You have no independent knowledge of the transaction, you were not employed by [199] Halton Tractor Company at the time, were you?

A. No; I was not. However, I feel that I have information that will be pertinent to this point which I would like to offer.

Q. Based on what?

A. On the mechanic and the way the transaction was handled, because they still get into our costs.

Mr. Blackstone: Well, your Honor, I think that if the man wasn't there and didn't participate in the transaction, there is no basis for his testifying.

The Witness: However, I can refer to the records at that time.

Mr. Sharff: He has the inventory cards covering these two trucks.

The Court: I will permit him to; it's in reference to the records.

The Witness: If you will recall, your Honor, a portion of the amount used in arriving at the total cost in the amount of \$48,496.10, one of the components was a \$2,200 check written to the United States Government. That was the amount of the proceeds of the sale of a 1946 Ford pickup and the 1942 Chevrolet coupe. We had to allocate that ex-

(Testimony of Frank Bostick.)

penditure and it was thrown into the cost of the initial acquisition.

You will notice in the schedule—I am sorry, I have forgotten the exhibit number—where they are set out with the [200] initial cost. I believe it's the second and fourth items set out. So it did go through our books. Yes; they are set up, the amount of money and initial cost; that is, the Ford pickup and Chevrolet coupe are set up as \$1,000, \$1,200 respectively, from the source of the entry, being from the initial check.

The Court: Yes.

The Witness: Paid to McAuley's.

Mr. Sharff: And the inventory card, I might add, is right in front of Mr. Blackstone now.

The Court: The \$2,200 was paid by McAuley?

The Witness: To us.

The Court: To Halton, yes; which in turn was paid to the Government.

Q. (By Mr. Blackstone): But you have no independent information as to what other than book-keeping entries were made by Halton Tractor in connection with the sales of those automobiles?

A. No.

Q. What are the component parts of the total operating expenses in the sales department?

A. Oh, I have a breakdown here before me, and I will read them and also explain the method of allocation. The first series of expenses are direct expenses.

Q. What do you mean by that? [201]

(Testimony of Frank Bostick.)

A. Expenses incurred directly in the operation as opposed to such things as administrative expenses, which are allocated—a portion of which are allocated to the sales department, while the direct expenses are in their entirety incurred by the sales department, such as——

Q. Does that include sales and salaries and commissions?

A. Salaries, traveling expense, policy allowance. I will give you an explanation of any of these items if you require it.

Advertising, delivery, and revisit, warranty, truck and car expense, loading and unloading of equipment, servicing new machines, demonstrations, and miscellaneous sales department expense. Those comprise the direct expenses charged to the sales department operation.

Indirect expenses: first is office expense, which includes salaries, legal and audit, travel, stationery and supplies, postage. A portion of this expense is allocated to the sales department on the basis of percentage of sales, which is the accepted method of allocating this particular type of expense.

The next category of classification of expenses is entitled "General expense," which includes insurance other than building—it is almost entirely payroll insurance, which is allocated to the sales department on the basis of payroll dollars—taxes other than building, which are the same thing, [202] payroll taxes allocated on a basis of payroll dollars and departments; depreciation other than buildings,

(Testimony of Frank Bostick.)

as allocated on the value of machines and departments.

Q. Depreciation on what items?

A. On depreciation of the machinery and equipment other than buildings. In our cross-breakdown we set up——

Q. On your tools and on that sort of thing? Is that what you mean primarily?

A. Well, that is primarily automobiles and tools used and purchased for the sales department, such as automobiles and that nature of item used by the sales department in the course of their operations.

Q. It's not depreciation on your inventory or anything of that sort?

A. No. Oh, no. Heat, light, water and power, and disposal. The basis of that allocation is on percentage of floor space. Telephone and telegraph is based on estimated usage. Dues and subscriptions and donations based on percentage of sales. And employees relations expense is based on payroll dollars per department.

We come to the next category of indirect expense, occupancy expense, comprised of building insurance, real estate, taxes, building depreciation, building maintenance and repair, and building rentals. The sum of these expenses are allocated to these various departments on the basis of [203] floor space.

Our final indirect expense is administrative, which is comprised of salaries, travel expense, automobile

(Testimony of Frank Bostick.)

expense, which is allocated on the basis of percentage of sales of departments.

The total amount of these expenses, direct and indirect, allocated to the sales department for the year 1948 is in the amount of \$191,689.

Q. Now I believe you have stated that in computing the initial cost column that you used the amount outstanding under the conditional sales contract and under the chattel mortgage of October 2nd, 1947, is that correct?

Mr. Sharff: Plus the amount paid to the Government.

A. And accrued interest.

Q. (By Mr. Blackstone): Is that correct?

A. Yes.

Q. Now, would you tell me how you computed the accrued interest under the conditional sales contract to January 31st, 1948?

A. Would you refer to the exhibit of the conditional sales contract? I would like to point out a term there.

Q. Yes.

A. I believe it's right on top, the pink one there. You will notice down there a provision for interest rate. I will read this: "With interest on deferred payments at the [204] rate of 7 per cent per annum from the date April 2nd, 1947, to maturity, and 9 per cent after maturity." I used the basis of 9 per cent in arriving at the interest due under conditional sales contract because the maturity date had passed and——

(Testimony of Frank Bostick.)

Q. What did you take as the maturity date?

A. I based my computation from January 31st, 1948, because if you recall the interest had been accrued and credit allowed for up to that period of time.

Q. Well, I would like to know what records you have in regard to the amount outstanding on January 31st, 1948, under the conditional sales contract; what records are there to show the exact amount, principal and interest, to January 31st, 1948?

A. The information I used in my computations was from a journal entry that was taken from a ledger card, which I don't happen to have in my possession at the time. However, I am sure it can be developed.

In other words, each individual contract is set up on an individual ledger card, the record of payments made and the schedule of payment is set out there on a description of the equipment, terms of interest and other pertinent information.

Q. You stated on direct examination those showed a balance on the conditional sales contract on January 31st, 1948, of [205] \$14,594.06 principal.

A. Correct.

Q. And interest up to that date of \$351.78?

A. Correct.

The Court: Where are you getting that figure?

Mr. Blackstone: This was his direct testimony.

The Court: I mean it's not on the sheet here.

Mr. Blackstone: No.

The Court: That is the basis for the allocation?

(Testimony of Frank Bostick.)

Q. (By Mr. Blackstone): That's right. Now, was that interest figure \$351.78 computed on the basis of 7 per cent or 9 per cent?

A. I will assume, because of the practice, that it was based on 7 per cent to maturity and whatever period of time from maturity to January 31st, it was based on 9 per cent on the delinquent portion.

Mr. Sharff: You didn't figure it yourself?

A. I did not figure it myself. I did not go back and check this computation.

Q. (By Mr. Blackstone): So you don't know how that interest figure was computed? You simply take it from a journal entry?

A. That is correct.

Q. And that came from a ledger?

A. Yes. [206]

Q. Or was it the other way around and not——

A. The entry on the journal was made from the source of information on the ledger card. So my——

Q. Then your computation thereafter for item D on Plaintiff's Exhibit 10, which is interest accruing under conditional sales agreement and mortgage, and referring only to that portion related to the conditional sales agreement, you used the rate of 9 per cent? A. Correct.

Q. On the balance. And that included the balance of principal and interest, is that correct?

A. It did not; only because we had already given Watson credit for that interest at that time. So it was merely on the principal amount of \$14,594.06.

(Testimony of Frank Bostick.)

Q. What do you mean, you have given him credit?

The Court: He has already put in the initial cost figures.

Mr. Blackstone: Oh, I see.

The Court: That is what I was going to ask you, if you hadn't already taken it in initial costs, but you haven't; that is——

The Witness: In addition, your Honor.

The Court: That is another interest item?

The Witness: Correct.

Q. (By Mr. Blackstone): Well, is interest included in the [207] initial cost, your interest up to January 31st? I thought it was.

A. That is correct, up to January 31st.

Q. \$351.78 was included in your cost column?

The Court: But he is now saying that that item of interest is another interest.

Q. (By Mr. Blackstone): That is right. It's accruing thereof, and you base that upon the principal, on the amount of \$14,594.06?

A. That is correct. I might add the period of that computation is from February 1st, 1948, to December 30th, 1948.

Mr. Sharff: Would it be also, or to the earlier date when the item was sold?

Mr. Blackstone: Let me—I think I can get into this.

Mr. Sharff: I am sorry.

Q. (By Mr. Blackstone): Are you familiar, Mr. Bostick, in Plaintiff's Exhibit 10, which of these

(Testimony of Frank Bostick.)

items are covered by the conditional sales contract? I think there can be an easy comparison made here, and if you haven't—the last five items.

A. On the conditional sales contract.

Q. Are the conditional sales contract items, except for the next to the last item—that is, DW-10 scraper 145, covered by the chattel mortgage?

The Court: 146, you mean. [208]

Mr. Blackstone: Well, it's 145 on mine.

The Witness: The items covered by the conditional sales contract?

The Court: Well, if I am looking—I mean——

Mr. Blackstone: Six—I don't know. It might be a typographical error on the copy. What do you have, 146, your Honor?

The Court: Mine says 146, CW-10, 566, CW-10 scraper 146, and CW-10 scraper 566.

Mr. Blackstone: Mine was 145.

Mr. Sharff: Mine does—it would be——

The Court: This is the one that is in evidence, so maybe we had better get——

Mr. Sharff: Let's get it straightened out right now.

The Witness: I have my original worksheet.

Mr. Sharff: These were typed, your Honor.

Mr. Blackstone: Your Honor, if you will refer to Defendant's Exhibit A, the chattel mortgage of October 2nd, 1947, it identifies a LaPlant Choate carryall, serial No. CW-10, 145.

The Witness: That is correct.

(Testimony of Frank Bostick.)

Mr. Blackstone: I think that would be the correct number.

The Court: Let's correct it, then.

Mr. Blackstone: May it be corrected, then, [209] on Plaintiff's Exhibit 10?

The Court: Referring to the conditional sales contract, CW-10 tractor, IN 2792, the LaPlant Choate CW-10 scraper, 566, and LaPlant Choate scraper, 5668.

Q. (By Mr. Blackstone): Now, all of those items, then, are shown as having been sold on December 30th, 1948?

A. That is correct.

Q. And that is taken from the records?

A. Correct.

Q. So you computed then interest up to that date? A. That is correct.

Q. At 9 per cent on that principal figure of \$14,594.06? A. That is correct.

Q. All of the other items, then, on this list are covered by the chattel mortgage, which is Defendant's Exhibit A, the mortgage of October 2nd, 1947, isn't that correct? A. That is correct.

Q. Now, would you state how you computed that portion of the interest shown in item D on Plaintiff's Exhibit 10, which you say is attributed to the chattel mortgage property?

A. Yes. I computed that on the basis of the interest as set out in the Industrial Loan Act, referring to the rates of the Morris Plan mortgage and using those figures.

(Testimony of Frank Bostick.)

Q. Which mortgage did you refer to for the interest rate?

A. I referred to the Morris Plan mortgage for the interest rate. [210]

Q. And do you recall what the Morris Plan mortgage rate was insofar as interest was concerned?

A. Two per cent per month on the first \$300 and one-half per cent per month on the balance.

Mr. Sharff: In other words, six per cent, then?

A. I beg your pardon?

Q. Six per cent, then, one-half of one—

Q. (By Mr. Blackstone): I read to you from Plaintiff's Exhibit No. 2, being the Morris Plan chattel mortgage providing: "In event of prepayment or default of more than fifteen days, interest, charges, collection costs and attorneys' fees at the highest rate allowed by the Industrial Loan Act, according to the terms of a certain promissory note of even date herewith executed and delivered by mortgagor unto mortgagee and any renewals thereof."

Have you found in this mortgage, Plaintiff's Exhibit 2, any more specific reference to the interest rate under that mortgage?

A. I didn't refer to this. I mean, as far as the rate, that was merely for the authority to charge the interest rate.

The Court: Yes, but there is no other rate there so far as you know?

The Witness: As far as I know, no, sir.

(Testimony of Frank Bostick.)

The Court: Isn't that as far as you know, [211] Mr. Blackstone, there isn't any?

Mr. Blackstone: No, as far as I know.

Q. Did you refer to any promissory note to see if any specific rate of interest was set forth?

Mr. Sharff: Pardon me, Mr. Blackstone. Probably we can shorten this. We will stipulate to the rate which Mr. Bostick used. It was the one we obtained from the Morris Plan and supplied to him as the rate to be applied under the Industrial Loan Act.

Mr. Blackstone: I appreciate that, but I wanted the question answered, nonetheless.

The Court: Would you rephrase the question again?

Mr. Blackstone: I am sorry, Judge.

Q. I said, did you refer to any promissory note to determine the rate of interest to be used in computing the interest item for the chattel mortgage property shown in Exhibit 10?

A. You mean as a basis for the rate?

Q. Yes. A. No, I did not.

Q. You then used the figure set forth in the Industrial Loan Act of California?

A. That is correct.

Q. Do you know what rate of interest is charged under the second mortgage, that one dated October 2nd, 1949? [212]

A. I don't recall offhand. I didn't refer to that in my computation.

Q. Did you refer to any note in connection with

(Testimony of Frank Bostick.)

the second mortgage for interest purposes, any promissory note?

A. No, I didn't. I don't believe that we were able to absolutely locate it at the time.

Q. Now then, on the basis of the interest figures you used, would it be correct to say that you took the principal—oh, pardon me, before I ask you that question, may I ask you in regard to that cost column, that component that is made up of the balance outstanding under the chattel mortgage of October, 1947, you stated on your direct examination was a principal amount of \$23,000. You stated that the interest item under the mortgage, chattel mortgage, was \$562.27? A. That is correct.

Q. Computed, I take it, to January 31st, 1948?

A. Correct.

Q. Now, was that interest item computed, do you know? A. No, I don't.

Q. You don't? A. Except—

Q. You don't know what rate was used?

A. I merely attested the figure as set out by my predecessor.

Q. Then I take it that you began your interest computation [213] here for purposes of your item D on Plaintiff's Exhibit 10 by taking the principal sum, \$23,000? A. That is correct.

Q. And you applied the Industrial Loan Act provisions to that sum up to the date of the very first sale of the item of equipment, did you?

A. That is correct.

Q. That would be February 6th, 1948, the date

(Testimony of Frank Bostick.)

on which the McAuley Motors sale of the pickup and Chevrolet were made?

A. That is correct.

Q. Then would you describe what you did with that figure? Do you have the figure in front of you, just what that amounted to?

A. Yes; I have the computation here.

Q. I would appreciate it if you would show us the way you computed it.

A. I reduced the balance of principal for the purposes of applying the interest rate as the items were sold. For the period February 1st, 1948, to March 9th, 1948, I used \$23,000. From the period March 9—

Q. In other words, you did not give any credit on February 6th for the sale for \$2,200 of the two automobiles?

The Court: That is because they weren't covered by the mortgage, by the note.

Q. (By Mr. Blackstone): Oh, but he used the chattel mortgage— [214] oh, I see.

The Court: They weren't covered by the Morris Plan chattel mortgage.

Mr. Blackstone: I beg your pardon. I see.

The Court: That is why they didn't.

Q. (By Mr. Blackstone): That was covered by the Morris Plan?

A. That is correct; but the automobiles don't enter into the computation at all.

Q. I see.

A. From the period March 9th to the period

(Testimony of Frank Bostick.)

April 6th, 1948, I used the amount \$8,000 as the basis for the application of the interest rate.

Q. In other words, you reduced the principal by \$15,000, is that correct? A. Yes.

Q. I notice that the first two entries on Exhibit 10 show a sale, two sales, on March 9th, 1948, totaling \$21,000? A. Yes.

Q. Can you explain why you did not decrease the remaining principal thereafter by \$21,000?

A. Yes. The total cost allocated to the equipment sold by us, with repairs, \$23,000 from the mortgage, and a balance of \$4,000 from payments to the Collector of Internal Revenue equal \$27,000. So I reduced the amount. In other words, [215] I used 23/27ths in basing my interest computation.

The Court: Oh, you reduced the amount that was due on the Morris Plan mortgage by the percentage that——

A. In applying the costly deduction factor, your Honor, for the purpose of computing interest.

The Court: I see.

Q. (By Mr. Blackstone): You didn't treat this as a situation where, just a simple situation where \$23,000 principal was owing and you received \$21,000 on March 9th, leaving \$2,000 principal remaining to be paid? You didn't use that simple formula? A. No.

Q. Very well. Would you continue with April 6th, then; up to April 6th you used the remaining principal of \$8,000 to compute interest. What was

(Testimony of Frank Bostick.)

the next figure of principal you used on which you computed interest?

A. The next figure I used for computing interest was \$7,582.33.

Q. For what period?

A. For April 7th, 1948, to May 26th, 1948. Now I would like to go back here for a moment. I would like to, if I may, study this for a moment, your Honor, because I have kind of forgotten exactly the method I used here. I remember the method but I am trying to recall exactly what my basis was here. [216]

The Court: Yes.

A. I have a note here in my working papers after the \$8,000 figure. This will enter into this \$23,000 less .8333 times \$18,000 and—which is the initial cost of \$18,000——

Q. (By Mr. Blackstone): It's the initial cost of what? A. Of the first CW-10's.

The Court: \$21,000. Was \$18,000 on the books?

A. I have forgotten just exactly what relationship I was working at the time on that. I will go ahead and continue to give you the method of computation. You can check it out. The next item was \$7,583.33.

Q. (By Mr. Blackstone): That was up to May 26th, 1948, on which date there was a sale of CW-10 scraper, serial No. 136 for \$2,250, correct, the sale to Bud & Quinn?

A. That is correct.

(Testimony of Frank Bostick.)

Q. And then the figure, the balance, you did not use again the formula of deducting \$7,583, \$2,250?

A. Yes, I did. I took \$7,583 less .8333 times \$2,000 to arrive at a figure of \$5,916.66.

Q. \$5,000 what?

A. \$916.66, which was used for the basis of the computation for the period May 27th, 1948, to August 23rd, 1948.

The Court: That's the date.

Q. (By Mr. Blackstone): May I ask then the sales shown here of three diesel fuel tank wagons, 6/9/48, 6/23/48, 7/17/48, [217] you did not use that to reduce the principal outstanding?

The Court: That's for the same reason.

Q. (By Mr. Blackstone): For the same reason it was not covered by the Morris Plan chattel mortgage?

A. That is correct. The last computation was based on the figure of \$4,040.57 resulting from the computation of .8333 times \$5,916.66—I am sorry. May I restate that?

Q. Yes.

A. It was \$5,916.66 less .8333 times \$2,250, which gave us the resulting figure of \$4,040.57.

The Court: Well then, what happened when you made the \$4,500 sale on 8/23/48, the DW-10 tractor?

Q. (By Mr. Blackstone): You did not deduct \$4,500 then, from \$5,916.66 to—

The Court: Aren't you confusing that with—not you, I am now talking to the witness. Aren't you confusing this transaction with the one that

(Testimony of Frank Bostick.)

occurred on 5/26/48? I think you are just one behind.

The Witness: 5/26/48?

The Court: Mr. Blackstone is referring to the transaction of the DW-10 tractor No. IN 2173 which took place on 8/23/48, for \$4,500, which is probably the last transaction. I don't know whether it is or not, but I just say probably it is the last one concerned with the Morris Plan property.

Mr. Blackstone: Well, the last one is CW-10 scraper 146. [218]

The Court: Oh, yes, that is it—or 145? Let's get that straightened out now. I changed it to 6.

Mr. Blackstone: I changed mine to 6.

The Court: I corrected the original.

The Witness: The last sale was made on——

Q. (By Mr. Blackstone): December 30th, was it?

A. December 30th, which included a DW-10 IN 2167, and CW-10 was 145.

The Court: Yes, I know that.

The Witness: And the amount allocated to that piece of equipment for the period 8/24 to 12/30/48, was \$4,040.57.

Q. (By Mr. Blackstone): And how much did you consider was received on 12/30/48, for those two pieces of equipment? A. \$5,031.52—31.02.

The Court: 31.02.

Mr. Blackstone: That was the proceeds?

Mr. Sharff: 2 or 3?

The Witness: That was the proceeds.

Mr. Sharff: I am looking in the wrong column.

(Testimony of Frank Bostick.)

Mr. Blackstone: The DW-10 IN2167, which is the one covered by the chattel mortgage of the Morris Plan on October 2nd, 1947, show the sales of \$11,150.31, and that included scraper No. 145, according to the exhibit.

The Court: What is the question before the witness?

Q. (By Mr. Blackstone): Well, I am asking him if he wants [219] to revise his answer when he says that the amount of the sales price on the chattel mortgage equipment, the last sale, was \$5,131.02. It's in conflict.

A. Our schedule is in conflict but the original records——

Q. Which is correct, then?

A. Item No. 1 should be DW-10 tractor IN 2792. These two I just transposed, these two figures.

Q. Well, I am concerned with the sales price of IN-2167, which on our Exhibit 10 is shown as the sales price as being \$11,000——

A. I now note that the serial numbers have been transposed in the schedule, in referring back to my original worksheet that the amount——

The Court: The amounts of money have been transposed?

The Witness: No. The amounts of money—the position of the serial numbers in preparing the schedule have been transposed.

Mr. Blackstone: That could be a typographical error in typing this, your Honor.

The Court: Certainly, that is all right.

(Testimony of Frank Bostick.)

Mr. Blackstone: We had a great deal of problems, your Honor, in typing the schedule because you can't get a wide carriage machine for love or money at this time of the year, at income tax time. We had to use a single carriage machine, and the typist had to hold it over and work it this way [220] (indicating).

The Witness: Well, the amount—I believe the answer to Mr. Blackstone's question, your Honor, is \$5,131.02, actually, regardless of the reflection on the exhibit, which will have to be changed.

Q. (By Mr. Blackstone): And then thereafter you did—I just want to be sure to get the figures changed right.

The Court: You say the serial numbers are transposed?

A. In position.

Q. Actually, IN or IN-2792 should be in the place of IN-2167?

A. That is correct.

Q. And vice versa?

A. That is correct.

Mr. Blackstone: Let's look at the inventory card.

A. I have it on the original worksheet.

The Court: Let's do it now. Those are the only matters which have to be changed. All the other figures are accurate with the exception of the serial number. Item No. 3 should be IN-2791 instead of 27791. Just strike the one 7.

The Witness: Correct.

Q. (By Mr. Blackstone): And you are stating you are reversing then the serial numbers?

The Court: I think what we had better do is

(Testimony of Frank Bostick.)

not only reverse the serial numbers, but also the initial cost items. [221] Are they correct?

The Witness: The initial cost items are correct, your Honor.

The Court: You mean if you reverse——

The Witness: That is correct. I will offer my original worksheet for your examination.

The Court: All I care about is I just want to have the, be sure that we have it accurately. Put these in here and——

Mr. Blackstone: The inventory cards, your Honor, corroborate the statement. It's a typing error.

The Court: Well, it isn't a question of disbelieving the man. All I want to find out is what it is. His position is, as I understand it, is that these inventory numbers, serial numbers, are just transposed.

Mr. Blackstone: And that's all.

The Court: And that's all.

Mr. Blackstone: That is what I understood and I just——

The Court: So if we rearrange these inventory numbers——

Q. (By Mr. Blackstone): So from then on the item shown in parentheses 2 would be the equipment under the title and the one under parentheses 1 would be under the conditional sale, is that correct?

A. That is correct.

Q. And all the other figures along the columns

(Testimony of Frank Bostick.)

are correct and don't need to be transposed, I take it? [222]

Well then, on December 31st——

The Court: Well now, I will make the change here in pencil. So that there won't be any—let's see, that would be 2167 and 2792. All right, I think that covers it.

All right, Mr. Blackstone, go ahead.

Q. (By Mr. Blackstone): Then after December 30th, 1948, you had considered in your interest computation that the full principal and no further interest was computed thereafter, is that correct?

A. There was no further interest computed thereafter, no.

Q. The next item I would like to ask you about is the item shown as E parentheses on Plaintiff's Exhibit 10. This difference between actual overhead and base rate charge of \$276.89——

The Court: Is that marked E?

Mr. Sharff: Are there two D's in the copy you have, your Honor?

The Court: Yes, it should be E.

Mr. Sharff: That last one D and E, not two D's.

The Court: All right.

The Witness: In the year 1948 we used an applied overhead rate of \$1.15 an hour. At the end of the year——

Q. (By Mr. Blackstone): Now let me be straight about this in my own mind at this time. This is a

(Testimony of Frank Bostick.)

shop overhead rate, overhead which is in addition to the sales department overhead [223] that we have already gone into as item A?

A. What do you mean, in addition?

Q. Well, item A you were talking about, what I would call overhead expenses—would that be a misnomer to categorize item A as sales department overhead expenses?

A. That is right, that was that.

Q. And then this item E is additional shop overhead? A. That is correct.

Q. We saw on Defendant's Exhibits E, F, G and I that in the net column there is an overhead item entered. Now, would you explain what that overhead item that is made up on those exhibits came from?

A. Yes. In using the applied rate of \$1.15 an hour, the total hours—if you will notice in the hours column—have been added, and the overhead, the applied overhead rate of \$1.15 times the number of hours will give you the amount of money set out in overhead.

Q. On each one of those exhibits?

A. On each one of those.

Q. That you say was done in advance and—

A. That is correct.

Q. And at the end of the year, then, you figure actual overhead and— A. At \$1.33.

Q. And that is the correcting figure in [224] item E? A. Yes.

Mr. Sharff: Pardon me, I didn't get something. Mr. Blackstone, you said something about something

(Testimony of Frank Bostick.)

being a misnomer. Was your question that item A, sales department——

The Court: Sales department operating expense includes an item for sales overhead.

Mr. Sharff: Oh.

The Witness: That is sales overhead.

The Court: Well, is that the whole sales overhead?

The Witness: I thought it included——

Mr. Blackstone: Well, it included other things besides sales, didn't it, the share of administrative expense and all those things?

A. Yes, but that is part of the sales expense. It's an indirect application.

The Court: Yes, but I thought when you said when you made up this figure you made an allocation for certain overhead, administrative overhead, in the sales department operating expenses. Now are you using overhead as synonymous with operating expenses?

A. I believe Mr. Blackstone was. I call it sales operating expense.

Q. Which includes overhead?

A. Well, it was overhead; in a general usage it would be considered overhead. But as far as the technical explanation, [225] it's an operating expense of the sales department.

The Court: In any event, Mr. Blackstone, it's different from the item he is talking about in item E.

(Testimony of Frank Bostick.)

Mr. Blackstone: It may or may not be, your Honor.

The Court: That is what he says it is.

Q. (By Mr. Blackstone): Well, what items are included in this \$1.15 figure that you first estimate per hour? What are the component parts of that?

A. Direct service department expense, which I shall enumerate.

The Court: What do you mean by "direct service department"?

A. In other words, expenses incurred directly for the benefit of the service department, such as service supervisory salaries.

Q. Well, it isn't sales; it doesn't have anything to do with sales?

A. It doesn't have a thing to do with sales. You see, we break down our costs departmentally.

Q. I understand that. You have a sales department, service department?

A. Parts department.

Q. Parts department. All right. Now then, go ahead with the service department.

A. The service department direct expense is comprised of [226] service supervisory salaries, which are the general service manager, the three shop foremen, and the cost clerk. The service department, auto and truck expense, are small tools, supplies, and repairs, travel expense, service department vacations, and shop cleanup.

The indirect expenses applicable to the service department are portions of the same expense ap-

(Testimony of Frank Bostick.)

plied to the sales department. As I explained before, office expense is assigned departmentally on the basis of percentage of sales. The general expense, including—will it be necessary for me to review this, your Honor?

The Court: No, unless you want it in.

Mr. Blackstone: No, no, you have already outlined it.

The Witness: Yes, that is correct. Now those total expenses at the end of the year are added up and divided by the total number of man hours expended by the service department, arriving at a cost per hour of operation of the service department of \$1.33 for the year 1948. If you would like the figures, the exact figures on that, I have them here.

Q. I would like to ask if you have the figure of the total overhead expense for 1948 for Halton Tractor?

A. Including sales department, service department, and parts, the amount is \$312,985, taking into account——

Q. And you allocated that \$191,689 to sales; how much to [227] shop?

A. I don't have the rough percentage. I can give you the amount of money. The service department overhead was \$47,754.

The Court: Parts is the other one?

A. Parts department, \$73,542.

Q. (By Mr. Blackstone): And you say that taking the total number of labor hours put in dur-

(Testimony of Frank Bostick.)

ing 1948, you have that figure divided into \$47,754, comes out \$1.33 per hour?

A. That is correct. There were 64,695 hours.

Q. How many, 64,695 hours? A. Yes.

Q. And 64,000 into 47,000 comes out \$1.33 an hour?

A. You cut me off previously in an explanation. This 47,000 is a net figure; to that must be added the overhead credit to arrive at the actual overhead expense.

Now this will require an explanation of our procedures. When we charge time out, for instance, on used equipment, or other companies, which we classify as company expense maintenance, we charge, say, building expense, we credit labor, we credit overhead. That overhead credit reduces the over-all sales department expense as far as the total goes; but in arriving at our overhead cost, that credit is eliminated. That credit is not included. The figure you want to divide—your 65,000 hours is in \$86,127.

Q. Why? [228]

A. Because that is the total operating expense of the service department.

Q. I thought you said you had the figure 47,754 and you—— A. That is after giving——

Q. And these figures you gave me add up to the total overhead expense of \$312,985?

A. The ones I originally gave do, but they take into effect the service of the department of the shop, overhead credit——

(Testimony of Frank Bostick.)

The Court: Well, Mr. Blackstone, it's ten minutes after 12:00. If you want to go into these matters, I suggest that some sort of a conference be had if you are going to.

Mr. Blackstone: Well, I am practically finished.

The Court: Well, I don't want to foreclose you. All I want to do is get the thing worked out so we can get the record made without any argument, if necessary. Did you want to examine him on further subjects?

Mr. Blackstone: I think I have finished. I wanted to go through all these items.

The Court: Well, he will be available after the lunch hour. Do you have any redirect examination?

Mr. Sharff: Not at the moment, your Honor. I only have a very short rebuttal and redirect examination. I did want—if you are going to adjourn at this time, your Honor, I [229] would like to know——

Mr. Blackstone: Oh, there is something, but it shouldn't take long.

The Court: Well, take it up after lunch, after the noon hour. You want to put some documents in, don't you?

Mr. Blackstone: Well, I thought we had stipulated that the taxes were lawfully assessed in the amount shown on the exhibit that has already been introduced.

The Court: You will stipulate to that?

Mr. Blackstone: I have this request at this time, your Honor.

(Testimony of Frank Bostick.)

The Court: You mean we could conclude the evidence at this time in a few minutes?

Mr. Blackstone: I feel so, your Honor.

The Court: Well then, let's do it.

Mr. Blackstone: I have finished with this particular exhibit. I do have one question.

The Court: Ask the question.

Q. (By Mr. Blackstone): If you will look at—let me see if I have this correct here—yes, Defendant's Exhibit A, the chattel mortgage of October 2nd, 1947—you will notice a LeTourneau carryall, serial No. FRS-26269-FP-B, do the records of the Halton Tractor Company indicate what that item of equipment was sold for?

A. That was never taken into our records. [230]

Q. The LeTourneau model FP carryall, serial No. S26270-FP-B, do your records indicate anything about the sale of that piece of equipment?

A. No.

Q. The answer is no? A. No.

Mr. Sharff: Well, Mr. Blackstone, if you want any direct testimony on it I can offer Mr. Halton.

Mr. Blackstone: I am asking this accountant what the records show.

Q. The LeTourneau power control unit, Model TA, serial No. P959-TA, do the records show anything about that piece of equipment?

A. They do not.

Q. Do you have any knowledge about that equipment at all, your own personal knowledge as to what disposition was made of that equipment?

(Testimony of Frank Bostick.)

A. Only hearsay.

Mr. Blackstone: That's all I have.

Mr. Sharff: You can have the hearsay, if you want it.

The Witness: I know what the disposition of it was, as far as that goes.

The Court: Well, you can supply that information by Mr. Halton, can't you?

Mr. Sharff: Mr. Halton can, yes, on redirect examination. [231]

The Court: That is all. Do you have any questions, Mr. Sharff?

Mr. Sharff: Not of Mr. Bostick.

The Court: All right, that is all.

(Witness excused.)

EDWARD H. HALTON

called as a witness in his own behalf, in rebuttal; previously sworn.

Direct Examination

By Mr. Sharff:

Q. Mr. Halton, referring to the Ford pickup and the Chevrolet coupe, how did you dispose of those? A. We drove——

The Court: He has already testified to that. He already testified yesterday that he turned them over to McAuley and McAuley sold them.

Q. (By Mr. Sharff): Well, I don't think that

(Testimony of Edward H. Halton.)

is—what I want to know is this: Did you make a direct transaction with McAuley Motors for so much money for each tractor?

A. Right, for each, for the \$2200.

Q. They didn't act as sales agents and then pay you what they got from the proceeds?

A. Not on a consignment basis, no.

The Court: You sold the cars directly to them?

A. Yes, for \$2200. [232]

The Court: For the amount of money that is involved here?

Q. (By Mr. Sharff): Tell me this, Mr. Halton, do you know what happened to the equipment set forth in the Morris Plan mortgage which was not received and taken into inventory by you?

A. Part of it we never received. And part of it was, I think most of it we didn't receive. Is the one you are referring to——

Q. I am referring to the equipment you didn't have listed in the mortgage.

A. Right.

Q. Do you know what happened to it?

A. No.

Q. Do you know if Mr. Watson—well, it would be hearsay as to what happened to it.

A. Yes, sir; that is right.

Q. You never received it?

A. That's right, I didn't receive it.

The Court: Those are those LeTourneau——

The Witness: Power control units.

Mr. Sharff: That is all of Mr. Halton.

Mr. Blackstone: No questions.

Let me see if I understand the situation right here. Assuming, Mr. Blackstone, that we get to the point of where you conclude that these payments of taxes here were made under conditions which would entitle the persons to claim a refund or to claim that the money be paid back to the extent that there was no equity in the taxpayer's—in other words, is there any question that any equity remained on the equipment that Mr. Durston disposed of, as a matter of record here?

Mr. Blackstone: Well, your Honor, that seems to me to present a very different kind of question here as the evidence certainly was—there was no dispute about the evidence that Mr. Durston had no conversations with Reilly; that Reilly dealt solely with Halton. It seems to me that that raises——

The Court: Assume, though, that Halton was acting as his agent.

Mr. Blackstone: I don't want to be placed in the position of having to concede anything. I know your Honor is not putting me in that position now. But I have made no attack upon the figures as testified to by memory from Mr. Durston. I assume that his records would bear them out.

As it turned out, there seemed to be no equity in that property.

The Court: Well, the only reason I asked the question [236] is simply to get some idea of what I want you to discuss in the problem of briefing because it may be that we will have to dispose of this thing in stages; that is, have to determine where you stand and then direct counsel to prepare the

tabulation, and so on, that would be necessary from the evidence to find out what the situation is.

For instance, I see some possibilities here of where—I don't know that it's true—I know that the plaintiff will not concede this, but that you might have different rights under the conditional sales contract than those under the chattel mortgage.

Mr. Sharff: There is that possibility, your Honor. I think, though, that the decisions I could present to the Court of adoptable subrogation may be the difference.

The Court: Well, you may be correct but I am wondering in my own mind whether there may have been any merger or sustaining distinguishment of the Morris Plan obligation or chattel mortgage between Halton and the taxpayer. And that therefore, there is no problem, that therefore the Government lien attaches to the property. Now I don't know if that is so and I haven't checked the law on it.

Mr. Sharff: Well, I have briefly, your Honor, and I have one case squarely in point here.

The Court: You imagine you have or you wouldn't be in court, or at least you think you have. I don't know what [237] position the Government is going to take on it. But it seems to me those questions and those only as to the amounts of money, that comes after determination of that lien question, if we come to it, and the extent to which we come to it. That is the way I see it now.

Mr. Blackstone: I have this point, too, your Honor. I mean, it seems to me, of course, you do

have certain facts here about was there a voluntary agreement. I think that that is a point of the case.

The Court: I am not going to foreclose you. It is a part of the thing I want you to argue. In other words, everything that leads up to the proposition as to whether or not this was first a voluntary payment, if it wasn't, was it a payment made under duress or some sort of pressure, that would come within the section which you rely upon. That is a question I want discussed in all phases of it. I don't want to foreclose you now from arguing that.

Mr. Blackstone: And defer these problems of interest, computation, all of that. I think that would be a reasonable situation.

The Court: And then once I arrive at my conclusion as to what principle applies in that respect and to what property it applies, if you have any differences as to the properties, you may argue that at that time. Then I think that once we arrive at that point, I can direct counsel to [238] first of all attempt to see if they can agree on what calculations—if they can do that, what are the arguable issues and present them to me and I will decide them. It seems to me that is the way it should be decided. I don't want you to argue this other matter until we come to it.

Now what do you want on the time? You are the plaintiff. Do you want to present your issue? I want to get it disposed of while it's as fresh in my mind as possible because, while I have taken rather extensive notes on the matter—particularly on the issues before me first—I still like to do it while it's fresh

in my mind. I have some impressions, I want to keep those impressions fresh. Now what is the situation on time?

Mr. Sharff: I would like to have ten, ten and five if I could get it.

Mr. Blackstone: I will try to comply with that. I have a jury case——

The Court: I know you have a number of cases, Mr. Blackstone, not just this one.

Mr. Blackstone: I will be engaged in trial of the week of the 21st in Sacramento. But I would appreciate perhaps trying to get something done next week. Would that be out of line?

The Court: You could state your theory. You mean you want to file briefs at the same time? [239]

Mr. Blackstone: And then each could answer, perhaps.

Mr. Sharff: It doesn't make any difference to me if you want to do it that way. But I know I go into a jury trial in a few days.
opening briefs.

The Court: I will give you both ten days to file

Mr. Blackstone: Very well. We will try to comply with that, your Honor. If I find——

The Court: And then I will give you five days to make what answer you deem as necessary to each other's briefs.

Mr. Blackstone: Very well.

The Court: And that will put it down for submission when, Mr. Clerk?

The Clerk: April 1st for submission.

Mr. Blackstone: And our first brief is due——

The Court: Is due the 21st?

Mr. Blackstone: The 22nd?

The Court: Or the 22nd. All right, gentlemen, then that will be the order. If you are unable to comply with any briefs in this—if you are unable to comply with the briefing time, consult with one another about extensions and request the Court for extensions. I am not doing it because I want you to ask for an extension, but if you run into problems that you have to make some preparation on, why, rather than doing it on an ex parte order, see if you can't agree with one [240] another on it.

Mr. Sharff: Yes.

The Court: All right, then, that will be the order, and the Court will be at recess.

[Endorsed]: Filed October 29, 1956. [240A]

[Title of District Court and Cause.]

Nos. 32133 and 32134

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled

cases and constitute the record on appeal herein as designated by the attorneys for parties:

In 32133—Civil

Excerpt from Docket Entries

Complaint

Answer

Interrogatories to Halton Tractor Company

Answer to Interrogatories

In 32134—Civil

Excerpt from Docket Entries

Complaint

Answer

Interrogatories to Wes Durston, Inc.

In the Consolidated Case

Memorandum for Judgment

Findings of Fact and Conclusions of Law (In
32133—Civil)

Judgment (In 32133—Civil)

Findings of Fact and Conclusions of Law (In
32134—Civil) ,

Judgment (In 32134—Civil)

Notice of Appeal

Order Extending Time to Docket Appeal

Order Extending Time to Docket Appeal

Appellant's Designation of Record on Appeal

Appellee's Designation of Record on Appeal

Reporter's Transcript of Proceedings, March 9
and 10, 1955.

Plaintiffs' Exhibits: 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10.

Defendant's Exhibits: A, B, C, D, E, F, G and I.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 24th day of December, 1956.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 15396. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Halton Tractor Company, Inc., a Corporation and Wes Durston, Inc., a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: December 24, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15396

UNITED STATES OF AMERICA,

Appellant,

vs.

HALTON TRACTOR COMPANY, INC., a Corporation,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

vs.

WES DURSTON, INC., a Corporation,

Appellee.

APPELLANT'S STATEMENT OF POINTS
ON APPEAL

The appellant presents the following statement of points on which it intends to rely in these cases:

1. Halton's right to subrogation under the Morris Plan Mortgage cannot be raised in the District Court, because it was not raised in the claim for refund.

2. The facts of record show that the new mortgage given to Halton after notice of lien was filed was a novation.

3. Even if there was no novation, the tax lien of the government is entitled to priority both as to the

amount (\$2,070.00) added in the new mortgage to the amount paid by Halton on the old, and as to \$3,024.10, the proceeds of the sale of items not included in the Morris Plan mortgage.

4. Appellees were volunteers, and, in any event, their agreement to pay the tax if they were permitted to repair and sell at private sale free and clear of federal tax lien, was a binding contract entered into for valuable consideration.

Dated: December 28, 1956.

Respectfully submitted,

LLOYD H. BURKE,

United States Attorney,

By /s/ MARVIN D. MORGENSTEIN,

Asst. United States Attorney,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 28, 1956.

No. 15,396

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,
Appellant,

VS.

HALTON TRACTOR COMPANY, INC., a corporation and WES DURSTON, INC., a corporation,
Appellees.

On Appeal from the Judgments of the United States District
Court for the Northern District of California.

**PETITION BY THE APPELLANT FOR REHEARING,
OR ALTERNATIVELY, FOR MODIFICATION OF OPINION.**

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FILED FOR DEPOSIT

No. 15,396

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,
Appellant,

VS.

HALTON TRACTOR COMPANY, INC., a corporation and WES DURSTON, INC., a corporation,
Appellees.

**On Appeal from the Judgments of the United States District
Court for the Northern District of California.**

**PETITION BY THE APPELLANT FOR REHEARING,
OR ALTERNATIVELY, FOR MODIFICATION OF OPINION.**

*To the Honorable Circuit Judges Stephens, Pope and
Hamley of the United States Court of Appeals
for the Ninth Circuit:*

Comes now the United States of America, appellant herein, by its attorneys of record, and respectfully petitions that this Court grant a rehearing of the above-entitled case, or alternatively, that this Court modify its opinion and decision filed on July 23, 1958.

In support thereof the United States of America respectfully states as follows:

I. The United States does not here question the holding of this Court that the appellees had a right to maintain their actions and that the taxes were not paid with a donative intent. However, the United States does respectfully request that this Court consider further the question of whether Halton Tractor Company has already received sufficient proceeds from the sale of equipment to compensate it for the taxes paid and that certain language in the opinion be modified with respect to the various items to be considered as to this question.

The position of the United States is that Halton has already recovered the taxes which it paid to the Government on Watson's behalf, and as such has not borne the financial burden of the tax and is without standing to sue for its recovery. This question is completely independent of the matter of priority of liens, and it is resolved by an arithmetical determination of whether the amount that Halton paid out was exceeded by the amount that it received from the sales of equipment. As of the end of January, 1948, Watson's obligations to Halton were as follows (the pertinent figures are set forth in the Court's slip opinion, p. 12):

Conditional sales contract (4-19-47)	\$14,594.06
Interest due on above	351.78
New chattel mortgage (10-2-47)	23,000.00
Interest due on above	562.27
	<hr/>
	\$38,508.11

To the figure of \$38,508.11 must be added the cost of repairs made by Halton in order to put the equipment into a saleable condition. For all of the equipment sold, Halton spent a total of \$6,517.37 on repairs. (Ex. 10.) Halton was thus clearly out-of-pocket the sum of \$45,025.48, which we might term for our purposes here the cost of the equipment sold by him.

Next to be considered then is the amount received from the sale of the equipment, the sum of \$57,807.97. When the cost of the equipment (\$45,025.48) is subtracted from the selling price, there remains \$12,782.49, a figure which may be designated as the gross profit. From the \$12,782.49, however, Halton claims that it is entitled to deduct other items of expense. It is to two of these items, one designated "Sales Department Operating Expenses" and the other entitled "Interest Accruing under Conditional Sales Agreement and Mortgage" to which we now turn. In the opinion herein, this Court stated as follows (Slip Op. 12-13):

In computing what it received as a result of these sales, Halton charges an item of \$7,931.25, consisting of "Sales Department Operating Expenses", that is to say, what it called a proportion of the expense of its organization, including salesmen, incurred in making the retail sales of the machinery and equipment here involved. This Halton contends was a normal cost of accomplishing sales of equipment at retail. It also charged to the transaction interest on the amounts owing on the mortgage and conditional sales contract from January 31, 1948 to the date that the equipment was sold, amounting to \$1,935.27. * * *

The trial court filed an opinion prior to the making of its formal findings in which it expressed the view that these several items of expense incurred by Halton were properly charged by him. We think that in this the trial judge was correct; the charge for interest would appear to be proper under the principles which underlie *Jefferson Standard Life Ins. Co. v. United States*, 9 Cir., 247 F. 2d 777. Cf. *United States v. Lord*, 155 F. Supp. 105.

It is submitted that the record clearly discloses that neither of these expenses has been properly computed and, assuming that some such expense may be taken into consideration, the correct amounts must be determined by the court below on remand.

The first item, sales department operating expense, \$7,931.25, was arrived at "by allocating to the sale of Watson's equipment a portion of the annual cost of running Halton's used equipment sales department * * *." (R. 52.) The office manager for Halton testified that the operating expenses for 1948, direct and indirect, allocated to the sales department, were 13.72 percent of the total sales. Thus, the item of \$7,931.25 was arrived at by taking 13.72 percent of the total selling price of Watson's equipment, \$57,807.97. (R. 248.) The \$57,807.97 figure includes the selling price of the 1946 Ford pickup truck (\$1,000) and that of the 1942 Chevrolet coupe (\$1,200) and it is apparent that some selling expense has been allocated to these two items. (Ex. 10; R. 248-249.) Such an allocation is incorrect as the record discloses that

Halton did not incur any expense whatsoever in connection with the Ford and Chevrolet sold, neither of which was sold by Halton.¹ The \$7,931.25 selling expense figure has thus been overstated.

The remaining item in dispute is the so-called "Interest Accruing under Conditional Sales Agreement and Mortgage" in the amount of \$1,935.27. (Ex. 10.) In its opinion this Court stated that this figure represented "interest on the amounts owing on the mortgage and conditional sales contract from January 31, 1948 to the date that the equipment was sold." (Slip Op. 12.) Such is not exactly the case, however. The method by which this so-called interest was computed is highly irregular and should be further considered by the trial court on remand. As to the items covered by the conditional sales contract² (Ex. 1), there was a principal balance due on January 31, 1948, of \$14,594.06. Apparently, interest at the rate of 9 percent was charged on this balance due from February 1, 1948, to December 30, 1948, the date of sale. (R. 253-256, 258.) The conditional sales contract provides for interest on deferred payments at the rate of 7 percent per annum to maturity and 9 percent after maturity.

¹The situation regarding these vehicles may be quickly summarized: The Ford and Chevrolet were not in Halton's yard at the time of the seizure of the rest of the equipment, but had been delivered to the McAuley Motor Company for sale. They were never seized by the Government. McAuley sold the vehicles and gave Halton a check for \$2,200. (R. 107-108, 137, 187.) This was the net amount received by Halton from the sale of these vehicles and it obviously had no selling expenses in connection with them since it had nothing to do with the sale.

²DW-10 tractor No. IN2792, DW-10 tractor No. IN2791, CW-10 scraper No. 566, CW-10 scraper No. 568.

(Ex. 10.) However, the propriety of using an interest rate as high as 9 percent in order to determine the extent to which Halton has recouped the taxes paid should be considered by the court below. There appears no reason why the high rate set by the conditional sales contract as a penalty for delinquent payments should be used for a computation such as that presently before the Court.

Even more unusual, however, was the method used for computing interest on the balance of the equipment, that covered by the new chattel mortgage. (Ex. A.) First of all, although not entirely clear from the record, the interest rate used was apparently 2 percent per month on the first \$300, and one-half percent per month on the balance. (R. 259.) This rate was admittedly not derived from the promissory note supporting the new chattel mortgage. (R. 260.) Aside from the matter of the rate to be applied, however, the method by which the interest was computed was not only complicated, but downright peculiar. The starting point is the \$23,000 principal amount owing on the new chattel mortgage as of January 31, 1948. (R. 261.) On February 6, the Ford and Chevrolet were sold for \$2,200 and on March 9 two tractors were sold for \$21,000. Thus, by the beginning of March the entire principal amount under the new chattel mortgage had been recovered. However, Halton continued to compute interest for the remainder of the year. There is set forth in the footnote below a table showing the amounts by which Halton reduced the outstanding principal after each sale for purposes of

interest computations.³ It should be noted that the principal reduction bears no relationship to the sales prices received. It is obvious that Halton has attempted to figure interest on more than the outstanding amounts due on the mortgage. Such charges are not proper for purposes of determining whether or not Halton has recouped the taxes it paid for Watson.

In summary, Halton sold for \$57,807.97 property which cost him \$45,025.48. He received a gross profit of \$12,782.49 from the sales. Selling expenses and interest charges, properly computed, are to be deducted from this gross profit to derive the net profit. The correct amount of these items should be determined by the court below on remand. The court below in reconsidering these figures should determine whether or not the net profit was greater than the taxes paid, \$5,877.97. If so, Halton has not suffered any loss and is entitled to no recovery. Additionally, if the net profit is less than the taxes paid, Halton

³Table of items covered by new chattel mortgage, showing sales price, outstanding principal on mortgage, and amount by which Halton reduced principal for purposes of interest computation (R. 261-270; Ex. 10):

Date	Item Sold	Sales Price	Outstanding Principal	Principal Reduction
1-31-48			\$23,000.00	
2- 6-48	Ford and Chevrolet	\$ 2,200.00	23,000.00	-0-
3- 9-48	2 DW 10 Tractors	21,000.00	8,000.00	\$15,000.00
4- 6-48	Rooter	1,000.00	7,583.33	416.67
5-26-48	CW 10 Scraper	2,250.00	5,916.66	1,666.67
6- 9-48	Fuel Tank Wagon	250.00	5,916.66	-0-
6-23-48	Fuel Tank Wagon	250.00	5,916.66	-0-
7-17-48	Fuel Tank Wagon	250.00	5,916.66	-0-
8-23-48	DW 10 Tractor	4,500.00	4,040.57	1,876.09
12-30-48	Fuel Tank Wagon	74.10		
	and DW 10 Tractor	5,131.02	-0-	4,040.57

may recover no more than the difference. At this point, it must be noted that the question of whether or not Halton has suffered a loss from the tax payment is completely apart and aside from the question of priority of liens, and goes only to show the maximum amount which may be recovered assuming that the Government had no lien priority whatsoever.

II. This Court held that as to six items, the Government's lien had priority. These items were sold for a total of \$3,024.10. (Slip Op. 13.) The Court then went on to state that the lower court on remand should determine whether this full sum was to be credited against the taxes paid by Halton, or whether it should be reduced by repair expense and sales expense. As noted in part I to this petition, \$2,200 of this amount was received from a sale by McAuley Motors, and as to this amount Halton could not have incurred any sales expense. (R. 107-108, 137, 187.) Additionally, the Government questions the propriety of any such deductions whatsoever, as to these six items where the Government had priority of liens.⁴ There is nothing in the record to show that the Government might not have sold these items for more than \$3,024.10 had not Halton stepped in and paid the taxes. Also, it would appear that this sum of \$3,024.10 should be credited, not against the \$5,877.97 paid, but rather against the unrecouped amount of taxes computed as set forth in part I above. When so offset it is apparent that the repair and selling

⁴It should be noted that the Ford and Chevrolet were never seized. (R. 137.)

expenses of Halton have already been allowed, and no such deduction should be made.

For the reasons above stated, the United States of America petitions that the Court grant a rehearing, or in the alternative that the opinion filed on July 23, 1958, be modified.

Respectfully submitted,

CHARLES K. RICE,

Assistant Attorney General.

ROBERT H. SCHNACKE,

United States Attorney.

August, 1958.

CERTIFICATE OF COUNSEL.

I, Charles K. Rice, Assistant Attorney General, do hereby certify that this petition is presented in good faith and not for delay.

CHARLES K. RICE,
Assistant Attorney General.

I, Robert H. Schnacke, United States Attorney, do hereby certify that this petition is presented in good faith and not for delay.

ROBERT H. SCHNACKE,
United States Attorney.

No. 15,396

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA, *Appellant,*

VS.

HALTON TRACTOR COMPANY, INC., a Corporation and WES DURSTON, INC., a Corporation, *Appellees.*

**On Appeal from the Judgments of the United States District Court
for the Northern District of California.**

BRIEF FOR APPELLEES.

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FILED

JUN 19 1957

PAUL P. O'BRIEN, CLERK

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No. 15,396

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,

Appellant,

vs.

HALTON TRACTOR COMPANY, INC., a Corporation and WES DURSTON, INC., a Corporation,

Appellees.

On Appeal from the Judgments of the United States District Court
for the Northern District of California.

BRIEF FOR APPELLEES.

JURISDICTION.

The statement of Appellant as to jurisdiction, seems proper and correct.

STATUTES AND REGULATIONS INVOLVED.

Appellees believe that Appellant has, in its Appendix, set forth all of the statutes and regulations applicable.

STATEMENT OF CASE.

Appellees feel it is necessary to make an additional statement of the case covering certain important points which do not appear from the statement made by Appellant.

Appellant inadvertently by its statement misleads the Court to believe that the Morris Plan Co. mortgage was extinguished before the new mortgage to Halton Tractor Co. was executed. It is true as stated by Appellant, that Halton Tractor Co. paid to Morris Plan Co. the balance due on the mortgage to Morris Plan Co. but Morris Plan Co. did not discharge the mortgage of record as the language of Appellant would lead this Court to believe. The fact is that no discharge or release of the Morris Plan Co. mortgage was ever filed of record or delivered to Watson. (R. 97.)

Further, in stating the understanding between Halton and Watson as to what should be done with the equipment, Appellant makes the express statement that the only deduction was "after deducting the cost of repairs". A reading of the testimony of Mr. Halton shows that all of the costs and expenses of putting it in shape for sale and selling it at retail were intended to be deducted.¹

¹"and I agreed to do this for him, of course, deducting our cost of doing it." (R. 99.)

"* * * Otherwise put it in good running order so that we could list it with our regular list of used equipment and that we could sell it in an orderly manner to obtain a good price for Watson." (R. 100.) "We would deduct first, of course, the money he owed to us plus the cost of repair, labor and parts and the cost of selling as we pay our salesmen on a commission basis and we have other costs of selling, advertising and so on. * * *" (R. 100-101.)

Mr. Reilly testified that he took a trip to Los Banos with Mr. Halton, and there, in the business establishment of Halton Tractor Co., he affixed signs on the equipment that it was now the "property of United States Government". (R. 181.) Then on the return drive from Los Banos to Merced, Halton protested to Mr. Reilly that "he wasn't even getting a hearing or a trial of any kind." Mr. Reilly told Mr. Halton that he would have to pay it and then he could get a hearing. (R. 109, 135, 136.) Mr. Reilly also told Mr. Halton before there was any agreement by Halton to pay Watson's taxes, that Halton could *not even move the equipment* from his Los Banos place of business to his Merced yard *to repair it*. (R. 138, 139, 185, 186, 187.)

Reilly also told Halton that the government's claim was superior to the chattel mortgage and conditional sales contract because these taxes, withholding taxes and social security taxes had been incurred as the result of the operation of this equipment which fact gave them priority. (R. 104, 129, 130, 131.) Mr. Reilly explained this statement to Mr. Halton, saying:

"Yes, that's right. And he went on to tell me, too, that since the social security taxes had been incurred upon these machines, those were the ones that the Government was going to exercise on."
(R. 129.)

Appellant, we believe, inadvertently, misstates the opinion of the attorney whom Mr. Halton consulted. (App. Brief, p. 6.) The attorney told Mr. Halton the same thing that Mr. Reilly had stated, to-wit: the

Government could sell out Halton Tractor's property rights and interest to pay Watson's taxes. (R. 130.)

Appellant omits the important fact that the equipment was *immobilized* and in effect taken from the possession of Appellees by the acts of Mr. Reilly and his statement that Halton Tractor Co. *could not touch the goods*. (R. 138.) His acts and statements were just as effective as if he had taken them and moved them into a Government warehouse and padlocked the door.

Appellant omits to state that Durston spent a considerable sum of money repairing the equipment after he had it in his possession so that from the total proceeds of the sale he did not recoup one penny of the \$3,900.00 he paid for taxes. We will discuss these facts in detail in our argument. In fact, Appellant's statement of fact and argument say nothing about whether or not Durston recouped his tax payment for Watson.

This statement of the case omits to set forth that Halton had called Watson to Merced in the fall of 1947 and asked him what he intended to do about his delinquent balance, and Watson had then agreed to surrender the equipment into the possession of Halton and Durston so that there was in effect a foreclosure of the mortgage and a repossession under the conditional sales contract. (R. 33, 34, 35, 36, 37, 38.) The testimony was that if all of the equipment were sold at auction by the government, it would not have brought enough money to pay Watson's taxes, much less the balance due on the conditional sales contract to Durston, Halton and the mortgage to the Morris Plan Co. (R. 116, 117.)

On the right of Appellees to possession of the equipment, the Court found:

“That at the time of the acts of said Francis J. Reilly hereinafter referred to said Lloyd H. Watson had defaulted in the making of the payments due under the promissory note secured by said chattel mortgage and otherwise breached the terms and conditions of said chattel mortgage and also the payments due under said conditional sales contract were in default; that therefore the said Lloyd H. Watson had surrendered all said machinery and equipment to plaintiff; and that all said equipment was at said time in the possession of plaintiff and not in the possession of said Lloyd H. Watson.” (R. 54, 55, 61.)

SUMMARY OF ARGUMENT CONTRARY TO THE CONTENTIONS OF APPELLANT.

Neither of Appellees has recovered or recouped the moneys paid to the government in discharge of Mr. Lloyd Watson's taxes.

It is crystal clear from the record that Wes Durston, Inc. did not recover one penny of the \$3,900.00 he paid on account of Watson's taxes, and the Appellant's argument glosses over the figures in regard to Mr. Durston.

Likewise, plaintiff's Exhibit No. 10 shows that Halton Tractor Co., Inc., a corporation, did not recoup its money paid in discharge of Watson's taxes. Appellant reaches a contrary conclusion by taking the full benefits of Halton's repairing, refurbishing and

the cost of selling the equipment at retail as part of the stock of a going business, in apposition to having it auctioned off in its worthless condition when seized by Mr. Reilly, but refuses to consider or deduct Halton Tractor Company's expenses of selling at retail.

Appellant's contention that there is a variance between Halton Company's claim for refund and the proof at the trial because the Morris Plan mortgage was offered in evidence, mistakes the effect and application of the rule of equitable subrogation.

Appellant's contention in this regard further overlooks the fact that the Morris Plan mortgage was received in evidence under the rule of equitable subrogation to give the new mortgage to Halton Tractor Co. a priority in the amount of the balance due on the Morris Plan mortgage.

Appellant's argument on this point also asks this Court to hold that the form of a claim for refund is a rigid technical procedure, instead of applying the well established rule that claims for refund are only to inform the government of the general nature of the claim so that it may understand, investigate and pass upon the claim. In fact, under the facts of this case, Appellant asks this Court to use the forms, sufficiency and technicalities of the form of the claim for refund as a trap for the unwary.

Additionally, the letters of the Commissioner of Internal Revenue declining the claims, show that the claims were sufficient to enable him to decline the claims on two grounds and further that formally ap-

prising the Commissioner of Internal Revenue of the existence of the Morris Plan mortgage and the rule of equitable subrogation would have been an idle act.²

Appellees contend that any argument as to novation is completely without any application where the doctrine of subrogation is applicable and no case supports this contention of Appellant.

Appellees further contend that the Appellant has had full credit for the sale of the items not covered by the original or Morris Plan mortgage and original conditional sales contract; in fact a greater credit than if the government had kept them and auctioned them off in their dilapidated condition when immobilized.

The argument of Appellant that the taxes were not paid under duress is the old familiar argument that third parties like Halton Tractor Co. and Wes Durston, Inc. are in the habit of making gifts to pay third persons' taxes. The evidence shows no "donative intent" but rather "the threatened loss of property" by being taken from their possession, auctioned off to strangers, taken from them by strangers and thereafter lost to Appellees, a real fear of financial disaster if they did not pay a stranger's taxes. (See Finding of Fact VI (R. 56) as to Halton Tractor Co. and Finding of Fact VII (R. 62) as to Wes Durston, Inc.)

²The Commissioner had constructive notice of the Morris Plan mortgage because it was at all times of record in the office of the County Recorder of Merced County. Reilly's negligence in not finding it of record is a poor excuse. (R. 194.)

The argument of a binding contract by Appellees to pay Watson's taxes for a valid consideration, is equivalent to saying that a man with a loaded gun at his head receives a valid consideration for paying over his money to avoid having the trigger pulled.

The argument of Appellant that there can be no duress because Appellees might have sought an injunction or brought quiet title proceedings, is not supported by authority cited by Appellant and furthermore such proceedings, because of the delay, was not a plain, speedy or adequate remedy or protection from loss resulting to Appellees.

ARGUMENT.

I.

ANSWER TO ARGUMENT THAT APPELLEES HAVE ALREADY RECOUPED THE MONEY TO OBTAIN THE RELEASE OF THE PROPERTY.

- (a) Wes Durston, Inc., did not recoup any portion of the \$3,900.00 paid in discharge of Watson's taxes.

In this connection, it is well to keep in mind that Wes Durston, Inc. was an equipment dealer and the guarantor of the conditional sale contract, even after selling it to C.I.T. Corporation. (Plaintiff's Exhibit 7.) Furthermore, we believe this Court can take judicial knowledge of the fact that the finance companies, when they have a guarantor on paper who is financially responsible, let the equipment dealer take all the steps to preserve the security. Wes Durston, Inc., in accepting back the equipment from Watson,

had the legal and equitable right to do so, even before it paid off C.I.T. Corporation. It was acting to preserve its security against a threatened loss under a conditional sale contract which was in default.

There is no doubt that Watson was in default, even in 1947, under this contract (R. 155-156) and arranged already in 1947 to surrender the equipment to Wes Durston, Inc. (R. 157) by placing it in the yard of Halton Tractor Co. We think it well also to keep in mind that nowhere in Appellant's brief is it urged that there is any invalidity, priority or subordination involved in connection with the conditional sale contract, under which Wes Durston, Inc. claims.

Wes Durston, Inc. paid \$30,100.00 to C.I.T. Corporation, which was the amount of the balance owing by Watson on the conditional sale contract with Wes Durston, Inc. (R. 165.) In addition to this, Wes Durston, Inc. paid \$3,900.00 towards Watson's taxes, making his total outlay \$34,000.00. It cost Wes Durston, Inc. \$500.00 to move the equipment from Los Banos to Los Angeles (R. 166) and \$125.00 to move another piece of equipment from Lake County to Los Angeles (R. 166). It cost Wes Durston, Inc. about \$1,000.00 for two tires. (R. 167.)

Wes Durston, Inc. is now out of pocket a total of \$35,625.00.

Wes Durston, Inc. sold 4 DW 10's for a total of \$20,000.00 (R. 167) and 1 D 8 for \$6,500.00 and another for \$4,000.00 (R. 168). The total therefore received by Wes Durston, Inc. from the sale of the

equipment, was \$30,500.00, leaving a deficit of \$5,125.00. *In fact, the trial attorney for Appellant conceded there was no equity in the Durston equipment.* (R. 282.)

It is therefore crystal clear that Wes Durston, Inc. did not recoup one penny of the \$3,900.00 paid for Watson's taxes.

(b) **Halton Tractor Co., Inc.**, did not recoup its loss incurred by paying Watson's taxes.

A good standard by which to gauge the argument of Appellant on this point is the first two sentences on page 14 of Appellant's brief:

"In the cases at bar, it has been stipulated that the taxes paid were in fact assessed against Watson and that the government had a lien, duly filed and recorded, for the amount of those taxes. (R. 177, 210). Under the circumstances, there can be no unjust enrichment of the United States, nor anything unconscionable in its retaining the tax. See *Stone v. White*, 301 U.S. 532, 534; *Ohio Locomotive Crane Co. v. Denman*, 73 F. 2d 408 (C.A. 6th), certiorari denied, 294 U.S. 712."

We ask the Court to observe the half truth of this statement, created by completely omitting the fact that the taxes here were paid by third parties who did not owe them; it is always unconscionable to force strangers to pay the taxes of another person under threat of financial loss if they do not do so.

Halton Tractor Co. to clearly show the facts of the cost and sale of the equipment and its resulting loss introduced in evidence Plaintiff's Exhibit 10. This

was a complete summary of the figures of the entire matter. We have attached a photocopy of this Exhibit in the appendix of this brief for the convenience of the Court. Mr. Bostick, an accountant and the office manager of Halton Tractor Co. testified explaining the exhibit. (R. 213, 223.)

Exhibit No. 10 lists all of the items surrendered by Mr. Watson to Halton Tractor Co., other than those turned over to Wes Durston, Inc. The Court will also notice that the amount for which each item was sold is listed, also the name of the purchaser and the date it was sold; thus placing a complete record of the transactions made by Halton Tractor Co. before this Court.

Mr. Bostick explained the items of "initial cost", which makes up the first column of figures. (R. 216.) This item was the total, as of January 31, 1948, of the principal amount due on the mortgage and the conditional sale contract, including interest to that date, plus the \$9,977.97, paid for Watson's taxes. This is using the Morris Plan Co. mortgage as the basis of the charges because under the rule of equitable subrogation, the measure of Halton Tractor Company's rights are found in that instrument.

Appellant unfairly and unjustly disputes the right of Halton Tractor Company to deduct from the amount of the gross sales the following usual and customary expenses of operating a business that is selling merchandise at retail, to-wit:

(a) Sales Department Operating Expenses,
\$7,931.25;

- (c) Additional Interest, \$1,935.27;
 - (d) Ordinary profit on used equipment sold, \$1,618.62;
 - (e) Additional Shop overhead, \$276.89.
- (Identifying letters copied from Plaintiff's Exhibit 10.)

We will discuss the nature of each of these items and show the correctness of the application of them in this matter.

Item (a) is Sales Department Operating Expenses; this was the cost to Halton Tractor Co. of selling this equipment at retail in the usual course of its business. Of course, if Halton Tractor Co. had sold this equipment in one lot at wholesale prices to another equipment dealer, there would have been no sales expense. However, it is a matter of common knowledge that such a sale would have brought in much less than the \$57,807.97 realized by selling the equipment at retail. We feel confident that if Halton Tractor Co., in computing its loss, had put down what each article would have "brought at wholesale," there would have been loud screams from Appellant and a demand that we show what we obtained for the item at retail prices. Appellant does not hesitate to claim the whole benefit of the total proceeds of \$57,000.00 plus, obtained by selling the property at retail, but it has no hesitancy at shirking its duty in shouldering the usual sales costs of selling used equipment at retail.

The exact manner in which Halton Tractor Company's cost accountant reached this figure is fully ex-

plained in the record. (R. 272, 273.) There can be no doubt that it was figured in the usual and customary manner to ascertain the cost of sales.³

We respectfully submit that inasmuch as Appellant has the benefit of a retail sale, this expense of selling at retail is proper, as a deduction. We notice no reluctance on the part of Appellant in demanding the benefit of the full retail sales price of \$57,000.00 plus, and therefore sales cost is proper. Certainly Halton Tractor Co. should not assume it, if Appellant wants the benefit of it.

The item of profit (Item (c) on Exhibit 10) is the rate of profit that Halton Tractor Co. would have made on the sale of other used equipment. Certainly \$1618.62 profit on nearly \$60,000.00 worth of sales is such a minimum amount of profit to ask that there should be no argument by Appellant. Halton Tractor Co., Inc. could have sold other pieces of equipment to the purchasers shown on Exhibit 10 and would have made this small profit. There is no doubt that Halton Tractor Co. would have made some profit on the equipment it sold to Mr. Watson from the equity it hoped to create, and it was only the acts of the government that prevented the consummation of the transaction. There is no good reason why it should not be allowed its ordinary rate of profit in computing its loss or gain in this transaction.

³In this connection the trial judge offered to Appellant the opportunity of going into the correctness of these charges in more detail if he decided the other aspects of the case in favor of Appellees. However, Appellant chose not to attack these computations and did not go into them any further. (R. 284.)

The next item (d) on Exhibit 10 is the interest that accrued on the chattel mortgage and conditional sale contract from January 31, 1948 to the date that the equipment was sold. This is the amount of \$1,935.27. This was interest, figured at the ordinary rate, and is proper as a charge because neither the chattel mortgage nor the conditional sale contract was satisfied until these articles were sold. Only when Halton Tractor Co. sold these articles would interest stop accruing. In respect to this item, like all of the above items, Appellant simply says that they are not to be considered. Why they are not to be considered, we are not told. On the facts, the item of interest and all other items are proper.

The next item on Exhibit 10 is \$276.89, listed as the difference between the actual shop overhead and base rate charged. This was explained by Mr. Frank Bostick, Mr. Halton's accountant. (R. 222-223.)

His explanation was that the base rate for shop work was \$1.15 per hour and that was the customary rate to charge but at the end of the year 1948, when they totalled the cost of the operation of the shop against hours of work, their rate was actually \$1.33 per hour. It is therefore seen that this item could have been figured at \$1.33 per hour in the column on Exhibit 10 headed "Repairs in Halton Shop to place equipment in saleable condition." If the Court will read the answer of Mr. Bostick, found on pages 222 and 223 of the Record, it will readily see the justness of this charge.

In fact, we feel it proper to say that looking at each and all of the charges they amount to nothing more than ordinary bookkeeping to ascertain how a business enterprise ended up in a transaction. The net result of these figures is that Halton Tractor Co. lost the money it paid to the government in satisfaction of the taxes of Mr. Watson.

II.

ANSWER TO ARGUMENT BY APPELLANT THAT THE GOVERNMENT'S LIEN WAS SUPERIOR.

In introducing this argument, Appellant, in the second sentence under this point, makes the statement "that in paying off the Morris Plan Co. mortgage, the Halton Co. . . ." This is a misstatement of fact because, as we have heretofore pointed out, the Morris Plan Co. mortgage was not paid off. Rather, Halton Tractor Co. paid Morris Plan Co. the amount of the mortgage and became the owners of the mortgage "in equity".

- (a) **The District Court was entitled to consider priority of the Halton Tractor Co. under the Morris Plan Co. chattel mortgage. The case of Wes Durston, Inc., is not involved under this point.**

Appellant in the District Court at no time disputed the validity or extent of the conditional sales contract between Wes Durston, Inc. and Lloyd Watson. In this Court, Appellant has not in any way challenged the rights of Wes Durston, Inc. under this conditional

sales contract. Wes Durston, Inc. is not therefore involved in this point.

The Morris Plan Co. mortgage was introduced in the District Court, not as a ground for recovery but one of the pieces of evidence to establish the priority of the rights of Halton Tractor Co. The claim for refund filed with the Commissioner of Internal Revenue stated the rights of Halton Tractor Co. in the equipment to be: "belonging to it" and "owned by it". The Morris Plan Co. mortgage was therefore a piece of evidence in the chain of events, proving that the equipment belonged to and was owned by the Halton Tractor Co.

Appellee, Halton Tractor Co., is not advancing anything new at this time; equitable subrogation is a legal rule or doctrine, not Halton's ground of recovery.

Halton Tractor Co. did not in the District Court assert a new ground. Before the Commissioner it did assert the equipment belonged to it, and in view of its legal rights, and Watson's surrender of the equipment to it, that claim is fully established.

Secondly, equitable subrogation is referred and relied upon to give priority to the second mortgage to the extent of the first; in effect *feeds* the second mortgage.

We find it necessary in answering this point to argue the two following propositions:

1. Equitable subrogation is not a new "ground" for claim;

2. The claim filed with the Commissioner of Internal Revenue was sufficient in form.

1. The Appellant has not, to any extent, discussed the nature of the doctrine of equitable subrogation and it therefore becomes our duty to explain its nature and application in this cause.

This rule is best illustrated by the facts and its application in the case of *Potter v. U.S.*, 111 F. Supp. 585. In that case the fixtures of a restaurant were mortgaged by Crawshaw Corporation to Mrs. Crawshaw. About two years later the United States filed notice of its lien against the corporation. Crawshaw Corporation also owed Mr. and Mrs. Wilcox and they requested Mr. Potter to advance sufficient moneys to pay off the balance of the mortgage to Mrs. Crawshaw and \$1000 to Mr. and Mrs. Wilcox. Mr. Potter did this, taking a new mortgage for an amount greater by \$1000 and at a rate of interest greater than the previous mortgage. Mr. Potter relied upon the theory of equitable subrogation and he asked for priority over the United States to the amount due on the mortgage from Crawshaw Corporation to Mrs. Crawshaw. This, the Court allowed. The Court at page 588 of that opinion says:

“A person under no obligation who undertakes by agreement with an obligor to pay the latter’s debt, with the understanding that he will have the same or equivalent security to that held by the original creditor, and subsequently pays that obligation, will be subrogated to the rights of the original creditor, provided that the entire transaction places no innocent third party in a position more unfavorable than that in which he originally stood. *Industrial Trust Company v. Hanley*, 1933, 53 R.I. 180, 165 A. 223; *Burgoon v. Lavezzo*,

1937, 68 App. D.C. 20, 92 F. 2d 726, 113 A.L.R. 944; *Stovers v. Wheat*, 5 Cir., 1935, 78 F. 2d, 25; *Barnes v. Cady*, 6 Cir., 1916, 232 F. 318; *Rachal v. Smith*, 5 Cir., 1900, 101 F. 159; *Edwards v. Davenport*, C.C., 1883, 20 F. 756.

“Constructive notice of the junior lien is insufficient to defeat his right of subrogation, and his failure to find the junior encumbrance on the record will not be sufficient reason to deny him relief in equity. *Burgoon v. Lavezzo*, supra; *Industrial Trust Company v. Hanley*, supra. Mistake is considered a proper ground for relief in equity. *Industrial Trust Company v. Hanley*, supra; *Conti v. Fisher*, 1926, 48 R.I. 33, 134 A. 849.

* * *

“In applying the doctrine of subrogation, ‘no attention should be paid to technicalities which are not of an insuperable character, but the broad equities should always be sought out as far as possible.’ *Merchants’ & Miners’ Transp. Co. v. Robinson-Baxter, etc., Co.*, 1 Cir., 1911, 191 F. 769, 772. If justice will be served by allowing subrogation, conceptual and formalistic arguments will not bar the granting of relief.”

The rule of equitable subrogation has been expressly recognized by the Courts of the United States in the following five cases:

Ingram v. Jones, 47 Fed. 2d 135 (C.A. 10th);
Gross v. Tierney, 55 Fed. 2d 578 (C.A. 4th);
Stowers v. Wheat, 78 Fed. 2d 25 (C.A. 5th);
Empire Trust Co. v. U.S. Trust Co., 165 Fed. 2d 829 (C.A. 8th);
Burgoon v. Lavezzo, 92 Fed. 2d 726 (C.A., D.C.).

The latter case of *Burgoon v. Lavezzo* reviews many other cases and referring to the fact that the Federal cases have adopted the rule of equitable subrogation the Court says:

“These Federal cases clearly reflect the rule requiring liberal application of the doctrine of subrogation and we think they have so far committed the Federal Court to that rule that we ought not refuse to follow the equitable path they have chosen. Hence we feel obliged to recognize a right of subrogation in the instant case.”

We also refer to the language adopted from a decision by Justice Taft found in the *Lavezzo* case, as follows:

“If the purchasers, when they paid off these mortgages, had taken an assignment of them, instead of cancelling them, they could have stood up on them as a plank with which to escape from the wreck. We think that, in the eyes of equity, their relation to junior encumbrances is not affected by the ceremony of cancelling the mortgages. By paying them, under the circumstances of this case, they became substituted to the position of the mortgagees, so far as such a substitution was necessary to protect them from the injustice of having junior encumbrances force them to pay for the property more than once.”

The foregoing decisions establish that the Halton Tractor Co. should be given the protection of the Morris Plan Co. mortgage as against the claims of Appellant.

It appears from the foregoing that the Halton Tractor Company's claim is on the second or new mort-

gage and the extent of its priorities are measured by the Morris Plan Co. mortgage. The ground of the Halton Tractor Company's claim is still the second mortgage and it is admitted that a copy of this mortgage was submitted to the Commissioner of Internal Revenue. (Appellant's brief, page 19, R. 145-149.)

It is therefore quite apparent that equitable subrogation is not even a "ground" of recovery much less a new ground of recovery. On the contrary, it appears that it is consistent with the claim of refund, filed with the Commissioner of Internal Revenue and is merely one piece of evidence supporting its claim. It has been held that the *claim* for refund does *not have to contain all the evidence* or argument that is offered in the suit.

Snead Collector v. Elmore, 59 Fed. 2d 312, 314 (C. A. 5th).

2. The decisions of the United States Courts establish that the claim filed with the Commissioner of Internal Revenue was in form that complied with the statutes and Treasury Regulation No. 111, and also that the Commissioner of Internal Revenue waived any rights to object to any insufficiency of the form of claim. Additionally, we will point out to the Court that any further statement of detail by Appellee Halton Tractor Co. would have been the performance of an idle act.⁵

First of all, it is very apparent from page 18 of Appellant's brief, from the manner in which it has

⁵Just how Appellant's argument on this point applies in the case of Wes Durston, Inc., we are not told in the brief of Appellant and we submit it has not the slightest application in its case.

emphasized "in detail", "each ground" and "exact basis" that it contends for some rigid and stereotyped form of claims and that if you fail to perform any of the technicalities required, you are out in the cold. This is contrary to every decision we have been able to find and the true rule is simply:

"The statute and the regulations must be read in light of their purpose. They are devised, not as *traps for the unwary* but for the convenience of government officials in passing upon claims for refund and for preparing for trial. Failure to observe them does not necessarily preclude recovery."

National Commercial, etc., v. Duffy, 132 Fed. 2d 86, 90 (C.A. 3rd) (adopting language from *Tucker v. Alexander*, 275 U. S. 228.

As recently as 1946 we find the District Court stating:

"Here the Commissioner appears not to have objected to the sufficiency of the facts presented to him, but considered the claim and acted upon it. In as much as the Commissioner acted upon this claim when it was before him, I am of the opinion that it adequately set out the ground upon which refund was claimed, and presented facts sufficient to apprise the Commissioner as to the basis of taxpayer's claim."

Furniture Club of America v. U. S., 67 Fed. Supp. 764, 766.

"The Supreme Court of the United States has held that a notice fairly advising the Commissioner of Internal Revenue of the nature of taxpayer's claim which could nevertheless be re-

jected by him because too general or not complying with formal requirements, may be amended after the statute of limitations has run to correct the lack of specificity.”

United States v. Pierotti, 154 Fed. 2d 758, 761 (C.A. 9th).

It has also been held that the claim alone is not to be considered in determining the sufficiency of the form of the claim. It has been repeatedly held that other information furnished to the Commissioner by letter, affidavit and the supplying of documents is in the nature of an amendment of the claim.

United States v. Pierotti, *supra*.

If the Court will read the claims for refund (R. 8-10, R. 17-19) in light of the foregoing decisions and rules, we feel confident that this Court will conclude that the claim of Halton Tractor Co. “presented facts sufficient to apprise the Commissioner as to the basis of taxpayer’s claim.”

Upon the subject as to whether or not the claim filed by Halton Tractor Co. was sufficient to allow the Commissioner to act upon the claim, we feel that the letter of declination of claim is most pertinent and controlling. These letters were introduced in evidence as Plaintiff’s Exhibits 12 and 13. The Commissioner of Internal Revenue denied the refund claim on two grounds, one, the payment was voluntary and two, the sale would be of no effect because it would only reach the taxpayer’s equity.

The filing of a certified copy of the Morris Plan mortgage with the Commissioner of Internal Revenue

and the specific statement that Halton Tractor Co. relied upon the doctrine of equitable subrogation would not have in any way affected either one or both of the grounds of declination. The Commissioner would still have asserted that Halton Tractor Co. and Wes Durston Inc., were "Santa Claus", giving money to the Government. The Commissioner of Internal Revenue, no matter how many precise details were given to him, under oath, would still have insisted that Appellees had no claim for refund because the sale would only have affected the equity of Lloyd Watson. The Commissioner would never have recognized "duress" resulting from the fact that Mr. Reilly had immobilized and "seized" the equipment and threatened to sell and deliver its possession over to third parties so that it would be forever lost to Appellees.⁶

The Commissioner of Internal Revenue, in declining the claim for refund admitted that Halton Tractor Co. had certain superior property rights in the machinery and made his declination with that fact before him. (See letters of declination. Plaintiff's Exhibits 12 and 13 and paragraph 10 of Appellant's answer, R. 21, 250.) Neither the extent of that superior property right nor whether its source was the conditional sales contract or the chattel mortgage of one date or another was of any moment or impor-

⁶Appellees use the words "seizure", "seize", and "seized" in this brief only, as meaning acts done by Mr. Reilly, the Deputy Collector under color of law, depriving Appellees of the right to use their property and not in the sense of a valid, legal act, done in accordance with statute.

tance to him in reaching his decision to deny the claims. The claims for refund clearly set forth that they were based on property rights, superior to the rights of the Government and the case proved in the District Court establish exactly that. This proof was within the scope of Appellees' claims, as understood and acted upon by the Commissioner of Internal Revenue.⁷

The District Court concluded from the letters that the Commissioner was not deprived of the opportunity to consider the claim of Halton Tractor Co. for refund from the standpoint of that company's interest being superior or prior to that of the Government. (R. 50, 51.) The above observations establish the correctness of the trial Court's opinion.

(b) Answer to Argument to Novation.

Assuming that the transaction between Halton Tractor Co. and Mr. Watson was a novation, as claimed by Appellant, we are not apprised of any authority under which the novation eradicates or eliminates the rule of equitable subrogation.

Nowhere in its brief does Appellant cite a case to the effect that a novation makes inapplicable the rule of equitable subrogation.

We have looked in vain in Appellant's brief for such authority and carefully read the four cases cited by it on pages 21-22 of its brief. Neither of them

⁷This is all that is required by even the case of *Carmack v. Scofield*, 201 Fed. 2d 360 (C.A. 5th), cited by Appellant, at page 362:

"* * * but is confined to *the scope of the grounds* for refund, asserted in his claim for refund filed with the Commissioner."

have one word in them about equitable subrogation and none of them involve a situation where it was a question of priorities between a mortgage and an intervening lien.

In cases of equitable subrogation where there has been an extinguishment of the superior mortgage, nevertheless the subsequent mortgage has been held prior to the intervening lien.

The theory of a novation therefore offers no reason in any way depreciating the claim of Halton Tractor Co.

(c) Answer to argument with reference to articles of equipment not covered by Morris Plan mortgage.

It is the position of Appellee Halton Tractor Co. that with reference to the items not covered by the Morris Plan Mortgage the Government has been given a full accounting, full credit and has no cause for complaint.

It appears that a Ford pickup truck, a Chevrolet coupe and 4 diesel fuel tank wagons, listed on Plaintiff's Exhibit No. 10 were not covered by the Morris Plan mortgage.

The two automobiles were sold by Halton Tractor Co. for the amount of \$2200.00. If the Court will look at Exhibit No. 10 it will find these two items charged in at \$1000.00 and \$1200.00. This is part of the items comprising the cost used in the calculations of Exhibit No. 10. However, the Government is given full credit for \$1000.00 and \$1200.00 under the heading "Sold For". We have therefore \$2200.00 in the initial

“cost column” and a \$2200.00 credit in the “Sold For” column, i.e., a charge of \$2200.00 and credit of \$2200.00. This is, in effect, what we would call a “wash” item, one balancing the other. There is no prejudice to the United States Government nor gain to Halton Tractor Co.; both items could be cancelled across the board and the figures would end the same.

Going to the matter of the Diesel fuel tank wagons, we find that Halton Tractor Co. charged a total of \$296.10 as its cost for these items. Now, if Halton Tractor Co. had not received these four tank wagons its total cost would still have been \$48,496.10 because that is what it was out of pocket. The testimony of Mr. Bostick was that they reallocated the entire cost of this transaction among the different items of equipment. (R. 215 and 217.) This means that if Halton Tractor Co. had not received these four tank wagons this sum of \$296.10 would have been divided and added to the initial cost of the other items of equipment.⁸ The Appellant is in no way prejudiced by these tank wagons being figured in the entire transaction.

On the contrary, we see that there is no doubt that Appellant was benefited a great deal by the fact that these tank wagons were in two instances repaired and

⁸An example of the same situation would be the following:

A merchant buys a lot of suitcases for \$100.00 and there are 10 in the lot. We would say that the cost of each was \$10.00. Now, if later, 2 were lost the lot still costs him \$100.00 but each suitcase now costs him \$12.50.

In our case, if there were only 8 pieces of equipment in Exhibit 10 instead of 14, the cost of \$48,496.10 would have to be divided among the remaining 8 pieces.

in three instances were sold at \$250.00 a piece, bringing in a total of \$824.10 by the process of being sold at retail in the usual course of business of Halton Tractor Co. Appellant has no cause for complaint.

III.

ANSWER TO THE CONTENTION THAT THE TAXES WERE NOT PAID UNDER DURESS.

It is our contention and it was so found by the District Court that these taxes were collected from Appellees under that kind of duress, known as "duress of goods". The acts and statements of Mr. Reilly, even just from his admissions, fully support the finding of the District Court that he threatened financial loss to Appellees unless they paid the taxes of a third person. The facts as found by the District Court (R. 55, 56, 61, 62, 63) establish without doubt that they were sufficient to create a reasonable apprehension in the mind of a reasonable person that if they did not pay Mr. Watson's taxes their rights in the machinery would be lost by the government auction sale.

Furthermore, Mr. Reilly's act of affixing signs to the machinery in the possession of Appellees appears to have been an unauthorized procedure, not found in the Internal Revenue Code of 1939.

The very first sentence of the appellant's argument under this point is erroneous. This first sentence, page 24 of Appellant's brief is:

“These proceedings do not involve a case of a Collector of Internal Revenue having seized the property of third persons, the appellees, to satisfy taxes due and owing by a taxpayer, Watson.”

The contrary is the fact and the letter of declination, written by the Commissioner of Internal Revenue, recognizes, as does the answer of Appellant, that these machines were the property of Appellees. Furthermore, this statement seemingly assumes, and footnote 7 (page 27 of Appellant's brief) asserts that Watson was still in possession of the machines. The exact opposite is the fact; Watson was no longer in possession, he had voluntarily surrendered possession of the machines to Halton and Durston because of his default in payments due, and he had no right to again retake possession. It was at Wes Durston's demand that he put the machinery in the yard of Halton Tractor Co. (R. 157) and he, by his agreement with Mr. Halton, lost all right to possession to the machinery, by the very terms of the agreement with Mr. Halton. The Findings of Fact are definitely on the fact that Mr. Watson had surrendered the machinery to Appellees and thereby lost possession.⁹ The possessory and all other rights of Mr. Watson were subject to loss upon failure to make the pay-

⁹Finding of Fact No. IV, in part, is:

“That at the time of the acts of one Francis J. Reilly, hereinafter referred to, said Lloyd H. Watson had defaulted in the payments due under said Conditional Sales Agreement and therefore said Lloyd H. Watson had surrendered all said machinery and equipment to plaintiff; and that all said equipment was at said time in the possession of plaintiff and not in the possession of said Lloyd H. Watson.”

ments and this was binding upon Appellant. *Brinker v. Dougherty*, 134 Fed. Supp. 384, 386.

The best proof of what rights Reilly asserted and how completely they were in derogation of the rights of Halton Tractor Co. is well illustrated by Reilly's refusal to allow Halton Tractor Co. to repair and sell the equipment and then pay the Government's taxes. (R. 208.) It is therefore patent that Reilly asserted, on behalf of the United States, legal, equitable and possessory rights superior to any and all legal, equitable and possessory rights of Halton and Durston.

These acts and statements were duress because of their effect upon the minds of Mr. Halton and Mr. Durston.

It has been repeatedly held that duress is a state of mind and the test is the state of mind induced by the threat.

"The test is not the nature of the threats but rather the state of mind induced thereby in the victim, * * *"

Wise v. Midtown Motors (Minn.) 42 N.W. 2d 404, 407.

"The test seems to be now, not so much the nature of the threat or the words used, but the decision turns on the effect of the threat upon the mind of the servient party."

Shelton v. Triggs (Tex.) 226 S.W. 761, 775.

"The question for determination is as to how the influence used affected his mind * * *"

S. H. Kress & Co. v. Rust, 97 SW 2d 997, 1000.

In its findings of fact relating to duress the Court found, among other facts:

“That at all times prior to the payment of said sums of money by plaintiff to defendant it is believed that if said Francis J. Reilly proceeded to sell said equipment, as he threatened, the same would be taken from the possession of plaintiff by the purchasers at such sale and forever lost to plaintiff.”

(R. 56.)

The duress in this case was not the duress of common law but rather the duress which is the opposite of the intent to make a gift of the moneys paid. The contention of Appellant is that the payment by Appellees was voluntary and that they were mere volunteers or intermeddlers. This is just another way of saying that plaintiffs made a donation or gift to pay the taxes of Lloyd Watson.

The Circuit Court of Appeals for this Circuit has always held that “voluntary”, as used in the contention of the Appellant, means in the sense of “a donation”. This holding is upon the basis that nearly every act is in some sense voluntary but that the sense in which it is used in the contention of the Appellant is in the sense that it is “a donation”. The contention of a voluntary payment in the sense of a donation has been a common one by the Appellant and our Circuit Court held against it in the case of *Parsons v. Anglim*, 143 Fed. 2d 534, 537 (C.A. 9th):

“If the word ‘volunteer’ in tax parlance has become a word of art, meaning one who cannot re-

cover moneys paid as a donation to discharge another's tax, it is obvious that is the *volition of intent to donate* which is determinative, not the absence of coercion in the mere act of handling the moneys to the Collector, along with a protest that he does not owe it." (Italics by Court.)

A study of the facts and holding of the *Parsons* case will show it to be sufficient authority to support the holding that the payments herein were not voluntary. But because there is a mass of further authority we will discuss other leading decisions.

A payment under "duress" is the opposite of a "voluntary payment". A payment made under duress can never be called a "donation", because the voluntariness is absent.

It is for this reason that many decisions have used the test of "duress of goods" to prove that the payment was not "voluntary".

Justice Holmes in a leading decision referring to the payment of taxes criticized the slowness of Courts to recognize the implied duress under which payment of taxes is made.

"* * * courts sometimes, perhaps, have been a little too slow to recognize the implied duress under which payment has been made."

A. T. & S. F. Ry. v. O'Connor, 232 U.S. 280, 56 L. Ed. 436, 438.

The development of the law of duress is well sketched in the case of *People v. Orrington* (Ill.) 195 N. E. 642, 643, as follows:

“At the common law duress meant duress only of person, and nothing short of a reasonable apprehension of imminent danger to life, limb or liberty sufficed as a basis for an action to recover moneys paid. The doctrine became gradually extended, however, to recognize duress of property, as a sort of moral duress, which, equally with duress of person, entitled one to recover money paid under its influence. *Today the ancient doctrine of duress of persons (later of goods) has been relaxed, and extended so as to admit of compulsion of business and circumstances.* (citing cases.) * * * it is not necessary that the party paying the tax be in physical danger, or *that he be actually placed in a position that his property is about to be seized in satisfaction of the tax, or that his back be to the wall, so to speak.*” (Italics ours.)

However, in many decisions it has been held that there can be “duress of goods” even without seizure. The payment may be made to prevent loss without a seizure ever taking place and yet there may be “duress” used in the sense of “duress of goods”. This was held in the early case of *Robertson v. Frank Bros., Co.*, 132 U.S. 17, 33 L. Ed. 236 when the Court said at page 238:

“In that case, it is true, the fact that the importer was not able to get possession of his goods without making the payment complained of, was referred to by the court as an important circumstance; *but it was not stated to be an indispensable circumstance.*” (Italics ours.)

“When such duress is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary. * * * When the duress has been exerted by one clothed with official authority, or exercising a public employment *less evidence of compulsion or pressure is required*, * * *”

The Supreme Court in that case referred to the opinion in *Swift v. United States*, 111 U.S. 22, 28 L. Ed. 341, 343, and quoted therefrom, as follows:

“The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. * * * Money paid, or other value parted with under such pressure, has never been regarded as a voluntary act within the meaning of the maxim *volenti non fit injuria*.”

The rules laid down in these two cases by our Supreme Court have recently been referred to without citation of authority. This, we submit, because it is a rule so well established. We refer to the language in *Stahmann v. Vidal*, 83 L.Ed. 41, 305 U.S. 61, where on page 45, it is said as follows:

“Whether or not the tax was imposed upon the petitioners, they are, according to accepted principles, entitled to recover unless they were volunteers, which they plainly were not because they paid the tax under duress of goods.”

The evidence fully establishes that Appellees paid Mr. Watson's taxes to recover possession of equipment

which, for all practical purposes, was locked in a Government warehouse. In addition to this, Appellees were faced with the holding of an auction sale by the Government where each item of property would be sold to a buyer and without a doubt delivered by the Government official holding the sale into the possession of the buyer.¹⁰ In this manner the equipment would be completely taken from the possession of Halton and Durston and if they wished to recover it, they would have to sue each purchaser in a separate suit, and possibly in another state. Proof of the effect of Reilly's seizure and this threatened auction sale upon the mind of Halton, and through Halton upon Durston, amounting to duress is proven by the admissions of Mr. Reilly in his report, dated April 14, 1953, to-wit:

“Because of conversations with him (Mr. Halton) he (Mr. Halton) realized that were I to seize and sell the property owned by Lloyd Watson under existing liens that quite possibly he (the plaintiff) would never have had no funds made available to him to satisfy his claim * * *” (R. 199.)

¹⁰“But Mr. Reilly told me * * * that the Government had a right to seize this equipment belonging to Watson.” (R. 104.)

“That if we didn't pay the Government off, that the Government was going to have a forced sale and sell them and we would be left out in the cold.” (R. 113.)

“Q. (by Mr. Sharff). Why did you pay this money then, to the United States Government, Mr. Halton?

A. Because I was told that is the way I had to do.

Q. And what were you told the alternative was if you didn't pay it?

A. I was told that the goods would be seized and sold at a forced sale. And I knew this equipment wouldn't bring hardly anything on a forced sale because some of the equipment wouldn't even run.” (R. 115.)

Here we have proof of duress of goods from Mr. Reilly's own mouth.

The duress thus exerted upon Halton Tractor Co. was also exerted upon Wes Durston, Inc., because Mr. Halton called Mr. Durston on the telephone and told him about the conversations with Reilly, what Reilly had done, and that if they didn't pay the Government off, that the Government was going to have a forced sale and sell them and they would be left out in the cold. (R. 113.) Durston testified to conversations with Halton, in which the threats of Reilly were repeated to him, including the claim that his conditional sale agreement was of no effect against the taxes due from Mr. Watson. (R. 161, 162, 163.)

The evidence and findings establish that this is a case where the Collector of Internal Revenue attempted to take property of and in the possession of third persons to satisfy a claim for taxes owing from another person. The evidence and the findings show, without a doubt, that Mr. Reilly in the expression of the street "threw his weight around" and caused both Mr. Halton and Mr. Durston to believe that their conditional sales contracts and mortgage were worthless because Watson's employees had worked on these pieces of equipment and the taxes therefore arose from these pieces of equipment. (R. 104, 129, 130, 131.) The record further shows, without a doubt, and it was so found by the District Court, that Appellees both believed that the property would be sold at auction and they would get nothing because the amount the ma-

chinery would bring would only be sufficient to satisfy the Government's claims.

It is clear from the record that the equipment was no longer in the possession of the taxpayer, Mr. Watson, but had been surrendered by him into the possession of Halton Tractor Co. and Wes Durston, Inc.

The Commissioner of Internal Revenue recognized that the only right that Watson might have was an equity and it also appears that that equity could only arise if the articles were sold for more than the amount of the debt to Appellees because Watson had lost his right to possession. Into this scene comes Mr. Reilly who puts labels on each piece of equipment, seizing it as the property of the United States Government and asserting the right to *immobilize it* until the United States Government's taxes were paid. (R. 181.)

The Government's only right and legal procedure was to levy upon Appellees for any equity Watson might have in the equipment in their hands under Section 3690 of the Internal Revenue Code of 1939 (Appendix).¹¹ This levy would attach to the equity of Watson, if any, in the equipment. If Appellees refused

¹¹Mr. Reilly admitted that this was the proper procedure:

"A. * * * If he cannot pay it and we find out he has any property or salary of wages coming to him, we go and make out the levy which we have in our office, which is already signed by the Director of Internal Revenue. And we serve that on the party that either holds any interest that this taxpayer has demanding payment from that third party of any interest that the taxpayer would have with the third party such as salaries, wages, or equipment or anything else, that they would be holding." (R. 206.)

to pay over the value of the equity or deliver any property belonging to Watson to the United States Government, then Appellees were personally liable to the United States for the value of such rights under subdivision (b) of Section 3710, Internal Revenue Code of 1939. Under this subdivision (b) the United States Government could have brought a suit in the District Court against appellees for a money judgment.

“Section 3710 was apparently passed to remedy this; it imposed a direct duty upon the recalcitrant holder to surrender them, and authorized an action against him for their value if he refused.”

U. S. v. Metropolitan Life Ins. Co., 130 F. 2d 149, 151 (C.A. 2d).

Any other act than levying upon Appellees was the assertion of a power not given by law; an illegal seizure of property rights in the possession of third parties.

It is a far cry from reality to assert that the foregoing facts are only a mistake of law on the part of Appellees and not duress. We believe that even a Justice of this Court, upon finding a sign upon a piece of his property:

“Property of the United States Government
(Notice of seizure)”

might have grave fears and apprehensions of loss. It is this fear that creates “duress of goods”.

The same reasons are a complete answer to the argument of Appellant that there was no duress because

the rights of Appellees were subordinate to the rights of the United States, caused Appellees to fear financial loss, if they did not pay the taxes due from Lloyd Watson. This fear of loss, constituted "duress of goods" and the payments of money made by Appellees, were therefore made under duress. Appellees are therefore entitled to recover the same from the United States.

2. The claim for refund filed with the Commissioner of Internal Revenue informed him of the essential and general facts of Appellees' claim for refund and were sufficient for him to investigate, understand, consider and pass upon the claim. The Commissioner of Internal Revenue did not object to the sufficiency of the claim and on the contrary declined it upon two grounds, which recognized that Appellees had rights in the machinery superior to the United States. The grounds given in the letters of declination show that the filing of the Morris Plan Co. mortgage with the Commissioner of Internal Revenue would not have influenced him in his declination and the filing of the same with him would have been an idle act by Appellees. The rule of equitable subrogation is not the statement of a new ground of claim, but is merely a rule of law which feeds the new chattel mortgage to Halton Tractor.

3. In the case of Wes Durston, Inc., there was no showing by Appellant that its conditional sale contract was subject to any infirmity and no showing that it was in any way inferior to the claim of the United States. It was admitted by Appellant at the trial that Watson had no equity whatsoever in the machinery.

4. There is absolutely not one piece of evidence in the record that Wes Durston, Inc., recovered any part of the \$3,900.00 paid to Appellant on account of the taxes of Lloyd Watson.

5. The evidence shows that Halton Tractor Co. is entitled to calculate its loss in this transaction in accordance with Plaintiff's Exhibit 10 and it was entitled to judgment as rendered by the District Court.

The Findings of Fact and Conclusions of Law filed in the District Court are fully supported by the evidence in the case and justify the judgments in favor of Appellees. Judgments should therefore be affirmed.

Dated, San Francisco, California,

June 10, 1957.

Respectfully submitted,

HENRY M. JONAS,

ROY A. SHARFF,

Attorneys for Appellees.

(Appendix Follows.)



Appendix.



Appendix

Sec. 3690. Authority to Distrain.

If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with such interest and other additional amounts as are required by law, by distraint and sale, in the manner provided in this subchapter, of the goods, chattels, or effects, including stocks, securities, bank accounts, and evidences of debt, of the person delinquent as aforesaid.

(26 U.S.C. 1952 ed., Sec. 3690).

Sec. 3682. Levy.

In case of neglect or refusal under section 3690, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the lien provided in section 3670 exists, for the payment of the sum due, with interest and penalty for nonpayment, and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy.

(26 U.S.C. 1952 ed., Sec. 3692).

Sec. 3710. Surrender of Property Subject to Distraint.

(a) Requirement—Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy,

surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) **Penalty for Violation**—Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy.

(c) **Person Defined**—The term “person” as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

(26 U.S.C. 1952 ed., Sec. 3710).

PHF's EX. 10 FOR IDENT.

PHF's EX. 10 FOR IDENT.

DATE REC'D.	DESCRIPTION	SERIAL NO.	INITIAL COST	REPAIRS IN HALTON SHOP TO PLACE EQUIPMENT IN SALEABLE CONDITION	TOTAL COST OF SALES	SOLO FOR	SOLO TO	DATE SOLO
1/31/48	DW-10 TRACTOR	IN2581)	9000.00	1212.95	10,212.85	10,500.00	MURRIETTA FARMS	3/9/48
"	CW-10 SCRAPER	425)						
"	DW-10 TRACTOR	IN2582)	9000.00	573.88	9,573.88	10,500.00	"	3/9/48
"	CW-10 SCRAPER	430)						
"	1946 FORD PICKUP	E699C-839050	1000.00	--	1,000.00	1,000.00	McAULEY MOTORS	2/6/48
"	1942 CHEV. COUPE	EBA46673	1200.00	--	1,200.00	1,200.00	"	2/6/48
"	SOUTHWEST ROOPER	11607	500.00	35.12	535.12	1,000.00	LORING HOAG	4/6/48
"	CW-10 SCRAPER	136	2000.00	--	2,000.00	2,250.00	BUDD & QUINN	5/26/48
"	DIESEL FUEL TANK WAGON	--	74.00	65.12	139.12	250.00	GUIDO DELLA SANTA	6/9/48
"	"	--	74.00	39.62	113.62	250.00	LORINZETTI BROS.	6/23/48
"	"	--	74.00	--	74.00	250.00	JOE M. COSTA	7/17/48
"	DW-10 TRACTOR	IN2173	2250.00	1806.91	4,056.91	4,500.00	SANTA FE ROCK & GRAVEL	8/23/48
"	DIESEL FUEL TANK WAGON	--	74.10	--	74.10	74.10	HAROLD WINNHILL	12/30/48
"	DW-10 TRACTOR	(1) IN2192	9500.00	1650.31	11,150.31	11,150.31	"	"
"	"	(2) IN2167	4250.00	881.03	5,131.03	5,131.02	"	"
"	"	(3) IN2791	9500.00	252.53	9,752.53	9,752.53	"	"
"	CW-10 SCRAPER	566	INC. WITH (1)				"	"
"	"	45	INC. WITH (2)				"	"
"	"	568	INC. WITH (3)				"	"
(A)	SALES DEPT. OPERATING EXPENSES				7,931.25			
(B)	LESS: PORTION OF TAXES PAID BY HALTON REIMBURSED BY DURSTIN,				(3,900.00)			
(C)	POTENTIAL PROFIT ON BASIS OF SALES OF USED EQUIPMENT (EXCLUSIVE OF WATSON EQUIPMENT)				1,618.62			
(D)	INTEREST ACCRUING UNDER CONDITIONAL SALES AGREEMENT AND MORTGAGE,				1,935.27			
(E)	ADD: DIFFERENCE BETWEEN ACTUAL OVERHEAD AND BASE RATE CHARGED (SHOP O/H ONLY)				276.89			
					62,875.50			
	TOTAL PROCEEDS					57,807.97		
	" COST & REVENUE LOSS					62,875.50		
	UNRECOVERED COST & REV. LOSS					5,067.53		



No. 15406

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MAX SHAYNE and IRVING SHAYNE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF ON APPEAL.

MORRIS LAVINE,

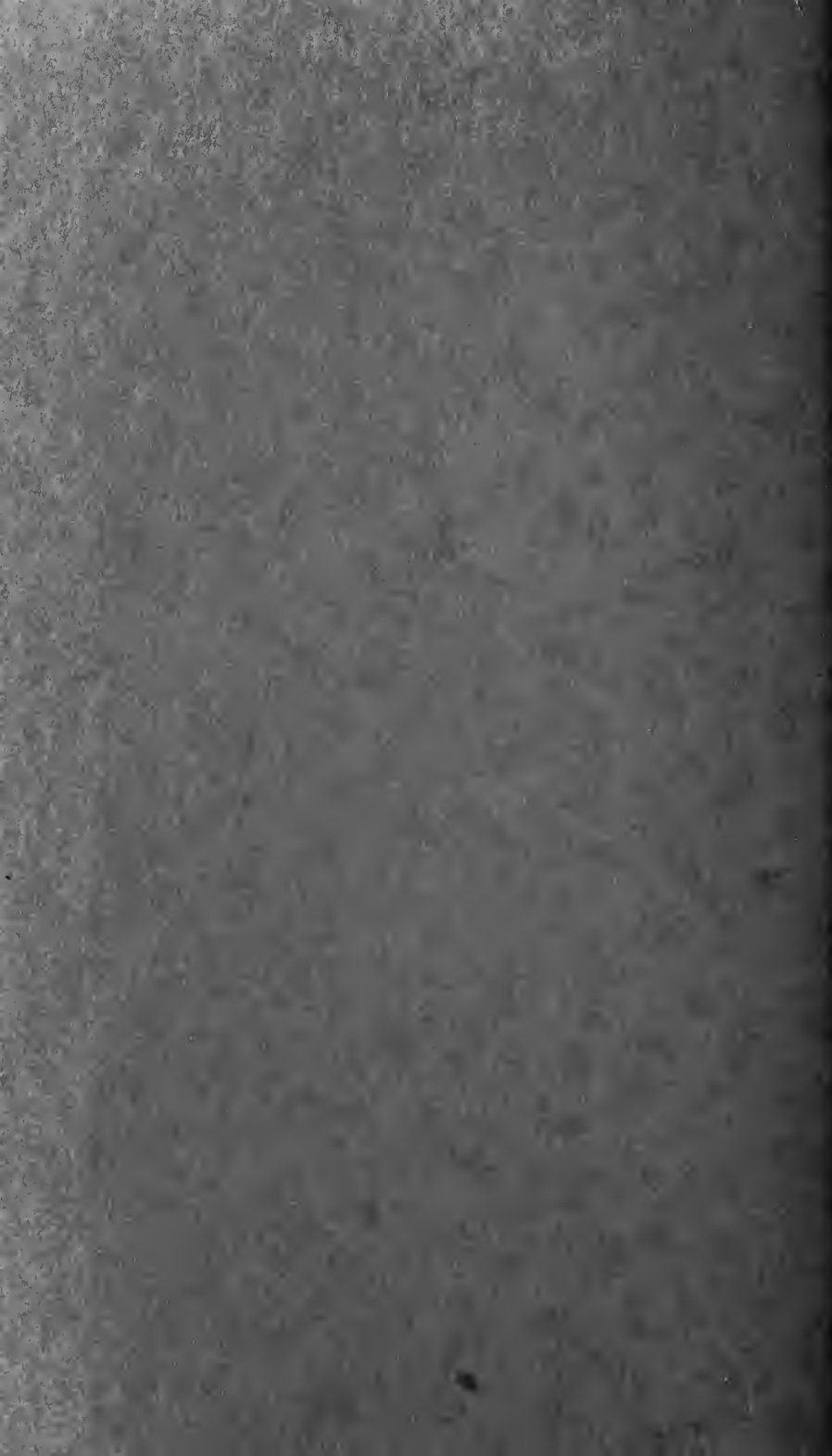
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FILED

JUL - 1 1957

PAUL P. O'BRIEN, CL



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No. 15406

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MAX SHAYNE and IRVING SHAYNE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF ON APPEAL.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 1291 and Rule 37 of Rules of Criminal Procedure for the District Courts of the United States.

The judgment was rendered in the District Court, notice of appeal duly filed, and time for filing the appeal was duly extended by the District Court, and by this Court, to and including June 25, 1957.

Statutes Involved.

U. S. C. A., Title Sec. 371—*Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or

for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Sec. 1010. *Federal Housing Administration transactions.*

Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper or document, knowing it to have been altered, forged, or counterfeited, or wilfully overvalues any security, asset, or income, shall be fined not more than \$5,000 or imprisoned not more than two years, or both. June 25, 1948, c. 645, 62 Stat. 751.

The Facts.

This is an appeal from judgments of conviction of two brothers, Max Shayne and Irving Shayne, of conspiracy (count one) to violate Section 1010 of Title 18, United States Codes, and of one brother to cause false statements to be passed, uttered, and published on financial institutions for F. H. A. loans in violation of counts two, three, five, six, seven and nine of the indictment. Each defendant was sentenced to five years on count one (conspiracy). Max Shayne was sentenced to two years on each of the other counts to run concurrently. The alleged offenses took place four years before the trial. The conspiracy charge encompassed the period between June, 1952 and April, 1953.

The Procedure.

The defendants were indicted January 4, 1956 in a multiple indictment—to-wit, nine counts [Cl. Tr. 1-92]. Count one charged conspiracy to obtain loans under Title 12, Section 1703, by means of false and fraudulent written statements which would be made by the defendants and their co-conspirators, which loans would not be made according to the act and regulations.

The indictment charged the conspiracy to begin in June, 1952 and continue until April, 1953, charging that they conspired “together and with other persons, whose names are to the grand jury unknown, * * *.”

Demand was made for a Bill of Particulars, requesting, among other things, specifications as to who were the other persons with whom the defendants conspired. [See Clerk's Transcript—Mo. Bill of Particulars, Feb. 15,

1956.] The Government replied, in the few points ordered answered, as follows:

“The government will not contend at the trial that any other persons were co-conspirators with the defendants.”

The indictment was sent to the jury room after the jury retired to deliberate [R. Tr. 2424 and 2435]. The court stated “and the entire indictment, excluding the count that has been dismissed, will be sent to the jury room for your use, because it will appear from these instructions you should check portions of it with considerable detail.” [R. Tr. 2424.]

The court then read to the jury as part of his instructions:

“Beginning on or about the month of June 1952 and continuing until the month of April 1953, defendants Max Shayne and Irving Shayne did wilfully and knowingly agree and conspire together and with other persons, whose names are to the grand jury unknown, as follows:” [R. Tr. 2424].

The court did not send the Bill of Particulars to the jury room, nor did he inform the jury that the conspiracy was limited to Max and Irving Shayne by reason of the Bill of Particulars.

Contrary to the Bill of Particulars, the court instructed the jury as follows:

“While it is necessary that there be two or more conspirators, one of the persons on trial can be found to have not been one of the two or more. Now, the case as it has developed here has presented the possibility that many persons other than those on trial might lawfully be found to have been members of a

conspiracy. And if you believe one or the other or both of the defendants were members of such conspiracy, then you could return a verdict of guilty as to each defendant.” [R. Tr. 2452.]

The indictment charged the defendants with conspiracy in count one, and with substantive counts in two to nine, inclusive. During his argument the prosecutor said:

“Now, Ladies and Gentlemen, these substantive counts themselves are the basis of our proof on the conspiracy.” [R. Tr. 2293.]

Irving Shayne was acquitted on the substantive counts.

The indictment thus actually, in effect, charged eight little conspiacies, one with each of the applicants for F. H. A. loans, in one grand and general conspiracy count in violation of the rule laid down in *Kotteokos v. United States*, 328 U. S. 750, 90 L. Ed. 1557.

Count two charged causing a false statement to be passed, uttered and published to the Citizens National Trust & Savings Bank in an F. H. A. office about Archie L. and Viola Thompson for \$2,395 [Omit Act 5 of count one indictment].

Count three, \$1,600 loan application by Henry E. and Martha Green for \$1,600 [Omit Act 1 of indictment].

Count four, October 15, 1952 loan application of \$800 by Mandell and Moshell Dakes [Omit Act 3 of count one].

Count five charges Max Shayne alone with having caused, on or about October 3, 1952, Eligh S. Moore and Vivian Moore to pass, utter and publish false statements to borrow \$1,900 when only \$1,600 was to be used for housing repairs; count six charges Max Shayne on or

about September 5, 1952 with having caused David L. Hamilton to apply and receive \$1,580 when he intended to use only \$700 for the same. Count seven charges Max Shayne on or about July 15, 1952 with having caused Joe Olsen and Leona Olsen to have passed, uttered and published false statements to obtain \$1,200 when they intended to use only \$1,600 for the purposes set out in the application. Count 8 charged that on or about June 16, 1952 Max Shayne caused H. C. Cooper to pass, utter and publish false statements to the Citizens Bank to obtain \$1,400 when they (he) intended only \$700 to be used for the purposes set out in the application. Count Nine charged that on or about June 17, 1952 Max Shayne caused Earnest C. Johnson and Flordie Mae Johnson to pass, utter and publish certain false statements in a loan application to the Citizens National Trust and Savings Bank to obtain a loan of \$1,300 "with intent to use the entire sum of \$1,300 in a manner and for purposes other than as stated in the credit application."

Appellants moved to dismiss the indictment on the ground that it failed to constitute an offense against the United States; also that it violated the Sixth Amendment of the United States Constitution because it was too vague and failed to apprise the accused of the nature and cause of the accusation as required by that Amendment, embracing with reasonable certainty the particulars of time, place, and person. This motion was denied.

Motions were made for a Bill of Particulars under Rule 7 of Criminal Procedure for the District Courts of the United States, and denied as to each count except as hereinafter set out. This bill asked detailed specification as to each count as to: the exact statement or state-

ments alleged to have been made [specification 3 of count one], the times, places, and persons present, the various documents referred to, the names of the co-conspirators, how and in what way sums would be used other than specified in the loan applications, and the exact sums intended to be used and for what purpose. The court ordered the bill granted only as to whether the Government will contend that any other persons were co-conspirators. Paragraphs 2, 6—the names of the persons the defendants allegedly met and assisted in obtaining loans. Paragraphs 8, 10, 11 of defendants' demand for bill as to count one, specifying the documents referred to in that count, the companies the defendants represented as salesmen, and the companies used to share work had been completed. As to all other matters and things, the bill was denied.

Motion for inspection of documents under Rule 17(2) for all documents was denied except as "obtained from these defendants" was granted. In every other respect it was denied [Minutes of March 12, 1956].

A *subpoena duces tecum* to produce all documents, books, papers, objects (except memoranda prepared by Government counsel), including all papers, memoranda, records, solicited by or presented or volunteered to any agency of the Government, was denied.

The trial lasted four weeks, resulting in acquittal of Irving Shayne as to all counts except the conspiracy count—count one. Max Shayne was convicted of counts 1, 2, 3, 5, 6, 7, and 9. Each defendant was sentenced to five years on count 1, and Max Shayne was sentenced to two years on each of the remaining counts, to run concurrently.

Specification of Errors.

I.

THE DEFENDANTS WERE ERRONEOUSLY CHARGED WITH MULTIPLE CONSPIRACIES IN A SINGLE CONSPIRACY COUNT IN VIOLATION OF THE RULE OF KOTTEOKOS V. UNITED STATES, 328 U. S. 750. THIS PROCEDURE DENIED THEM FAIR TRIAL, GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

II.

THE TRIAL COURT ERRONEOUSLY SENT THE INDICTMENT TO THE JURY ROOM DURING THE JURY'S DELIBERATIONS. THE COURT FAILED TO SEND THAT PORTION OF THE BILL OF PARTICULARS TO THE JURY ROOM, WHICH ELIMINATED ALL OTHER PERSONS AS CONSPIRATORS EXCEPT THE TWO DEFENDANTS.

III.

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT PERSONS OTHER THAN THE DEFENDANTS COULD BE CONSPIRATORS, CONTRARY TO THE SPECIFICATION IN THE BILL OF PARTICULARS.

IV.

THE INDICTMENT FAILED TO STATE AN OFFENSE AGAINST THE UNITED STATES IN THAT IT FAILED TO INFORM THE ACCUSED OF THE "NATURE AND CAUSE" OF THE ACCUSATION, AS REQUIRED BY THAT AMENDMENT.

V.

THE COURT ERRED IN DENYING DEFENDANTS THE BILL OF PARTICULARS IN ALL OTHER RESPECTS, AS REQUESTED. THIS DENIED THE DEFENDANTS AN OPPORTUNITY TO PREPARE FOR THEIR DEFENSE.

VI.

THE COURT ERRED IN REFUSING THE DEFENDANTS THE RIGHT OF FULL INSPECTION OF ALL DOCUMENTS AND REFUSING TO ORDER COMPLIANCE WITH THE SUBPOENA DUCES TECUM.

VII.

TITLE 18, SECTION 1010, UNITED STATES CODE, HAS BEEN UNCONSTITUTIONALLY CONSTRUED AND APPLIED, AND IS INHERENTLY UNCONSTITUTIONAL IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AS BEING TOO VAGUE, INDEFINITE, AND UNCERTAIN.

VIII.

THE SECTION REGARDING FALSE STATEMENTS REQUIRES THE APPLICATION OF THE TWO WITNESSES RULE, AS IN PERJURY PROSECUTIONS. THE COURT FAILED TO SO INSTRUCT THE JURY.

IX.

THE VERDICTS ARE CONTRARY TO THE LAW AND THE EVIDENCE. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICTS.

- (a) THE ACQUITTAL OF IRVING SHAYNE ON ALL SUBSTANTIAL COUNTS NECESSARILY ACQUITTED HIM OF THE CONSPIRACY COUNT WHERE THE PROSECUTION RELIES ON THEM TO ESTABLISH THE CONSPIRACY.
- (b) SINCE ONLY THE TWO DEFENDANTS WERE SPECIFIED IN THE BILL OF PARTICULARS, ACQUITTAL OF IRVING SHAYNE WOULD REQUIRE ACQUITTAL OF MAX SHAYNE ON THE CONSPIRACY COUNT.
- (c) THE STATEMENT, IF FALSE, WAS NOT MADE BY THE DEFENDANT. THE STATEMENT WAS THE INDEPENDENT ACT OF THE LOAN APPLICANT.
- (d) THE GOVERNMENT FAILED TO PRODUCE TWO WITNESSES TO EACH ALLEGED "FALSE STATEMENT."

- (e) NO EVIDENCE SHOWED THE LOANS WERE ACTUALLY F. H. A. LOANS.
- (f) THE GOVERNMENT FAILED TO PROVE FALSITY ON THE DATE ALLEGED.

X.

THE COURT ERRED IN INSTRUCTIONS GIVEN AND REFUSED.

- (a) THE COURT ERRED IN INSTRUCTING THE JURY THAT THERE WERE OTHER "CONSPIRATORS" WHEN THE GOVERNMENT HAD LIMITED THE CONSPIRACY TO THE TWO DEFENDANTS.
- (b) THE COURT ERRED IN FAILING TO INSTRUCT THE JURY AS TO THE PROVISIONS OF THE BILL OF PARTICULARS.

XI.

THE COURT ERRED IN FAILING TO GRANT JUDGMENTS OF ACQUITTAL ON THE CONSPIRACY COUNT WHEN THE JURY ACQUITTED IRVING SHAYNE OF ALL THE SUBSTANTIVE COUNTS. THERE CANNOT BE A SINGLE CONSPIRATOR.

ARGUMENT.

I.

The Defendants Were Erroneously Charged With Multiple Conspiracies in a Single Conspiracy Count in Violation of the Rule of *Kotteokos v. United States*, 328 U. S. 750. This Procedure Denied Them Fair Trial, Guaranteed by the Due Process Clause of the Fifth Amendment.

The two defendants were charged with a series of separate and multiple little conspiracies. Each statement in an application for a loan was necessarily a separate conspiracy with the loan applicant and not one grand conspiracy, as charged in count 1. Being a series of alleged little conspiracies, the combination into one conspiracy was contrary to the rule laid down in *Kotteokos v. United States*, 328 U. S. 750.

Like the *Kotteokos* case, this was a case involving F. H. A. loans,. Here, as there, a single person allegedly brought about the loan applications. But each was a separate party, making separate applications. This then, could not be a single conspiracy and was a misuse of the conspiracy statute.

The court in the *Kotteokos* case said the question it had to determine is whether a situation in which one conspiracy only is charged and at least eight having separate, though similar objects, are made out by the evidence, if believed; and in which more numerous participants in the different schemes were, on the whole, except for one, different persons who did not know or have anything to do with one another.

The case here has an analogous situation.

II.

The Trial Court Erroneously Sent the Indictment to the Jury Room During Its Deliberations. The Bill of Particulars Was Not Sent, This Eliminated All Other Persons as Conspirators Except the Two Defendants.

The indictment charged conspiracy with other persons than the two defendants. The government on the Bill of Particulars stated it would not contend that any other persons were conspirators. The indictment is not evidence. The Bill of Particulars limited its scope and the defendants could only be tried within its limits. (*United States v. Adams Express Co.*, 119 Fed. 240. Sending the indictment to the jury room under these circumstances was particularly prejudicial. While we have no case directly in point, we think this necessarily follows on general principle. An indictment is merely the first pleading on the part of the government. It may be based on hearsay or anything the grand jury feels sufficient to accuse a person of crime. Only papers which have been received in evidence should go to the jury room. (*Winters v. United States*, 201 Fed. 845; *Holingren v. United States*, 217 U. S. 509, 54 L. Ed. 861.) The indictment was not offered or received in evidence. Furthermore, it was limited by the Bill of Particulars, Rule 7C. The Bill of Particulars gives the defendant specific notice of what he has to meet on the trial. (*Luess v. United States*, 104 F. 2d 225; *United States v. Dillons*, 101 F. 2d 829; *Filiabreau v. United States*, 14 F. 2d 659; *Glasser v. United States* 315 U. S. 60, 66, 67.)

III.

The Trial Court Erroneously Instructed the Jury That Persons Other Than the Defendants Could Be Conspirators, Contrary to the Specification in the Bill of Particulars.

Since the government by its Bill of Particulars placed the defendant on notice that it would not contend that there were any other conspirators than the two defendants, it was prejudicial error to instruct the jury that other persons could be conspirators. This is like placing a person on trial on a charge not made.

Cole v. Arkansas, 333 U. S. 196, 92 L. Ed. 644;

De Jonge v. Oregon, 299 U. S. 353.

In *Cole v. Arkansas*, 333 U. S. 196 at page 201, the court said:

“No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, State or Federal.”

Re Oliver, 333 U. S. 257 at p. 273.

Here the defendant sought by Bill of Particulars to be placed on specific notice of the charge as to whether they were charged with conspiring with other persons and the Government elected by its Bill of Particulars to put them on notice that they would only be charged with conspiring with each other and no one else. They were therefore placed upon a trial upon a charge limited by the Bill of Particulars in effect were not so charged. (See

Cole v. Arkansas, 333 U. S. 196; *Dejonge v. Oregon*, 299 U. S. 353.) When the court instructed the jury therefore that they could be conspirators with other persons [R. Tr. 2452] when the court told the jury "Now, the case developed here has presented the possibility that many persons other than those on trial might lawfully be found members of a conspiracy. And if you believe one or the other or both of the defendants were members of such conspiracy, then you could return a verdict of guilty as to each defendant." The court, in effect, told the jury and placed the defendants on trial on a charge no longer made and specifically limited by the Bill of Particulars. We think this was of such prejudicial error as to require reversal of the judgments below.

IV.

The Indictment Failed to State an Offense Against the United States in That It Failed to Inform the Accused of the Nature and Cause of the Accusation as Required by That Amendment.

The Sixth Amendment to the Constitution of the United States must be read into every proceeding in the Federal Court and that amendment requires notice of the nature and cause of the accusation in the indictment.

Kotteokos v. United States, 328 U. S. 750;

United States v. Debrow, 346 U. S. 374, 98 L. Ed. 92;

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 548.

V.

The Court Erred in Denying Defendants the Bill of Particulars as Requested. This Denied the Defendants an Opportunity to Prepare Fully for Their Offense. The Defendants in This Case Moved for a Bill of Particulars at the Beginning of the Case. The Request Was Quite Specific and Detailed and Necessary for the Defendants to Prepare Their Defense. The Court Denied the Motion, in Most Respects, as Requested.

In *United States v. Debrow*, 346 U. S. 378, *Glasser v. United States*, 315 U. S. 60, 66, the United States Supreme Court said: "If the defendants wanted more definite information as to the name of the person who administered the oath to them, they could have obtained it by requesting a Bill of Particulars, Rule 7—Fed. Rules of Criminal Procedure." But in the instant case the defendants did request the more definite information and it was denied, therefore, the defendants were highly prejudiced by this denial.

VI.

The Court Erred in Refusing the Defendants the Right of Full Inspection of All Documents and Refusing to Order Compliance With a Subpoena Duces Tecum.

The right to use the *Subpoena Duces Tecum* to produce documents into court for trial and defense is a basic right and anyone who has possession of these documents is as much required to produce them as any other person. The *Subpoena Duces Tecum* is a method of securing those documents into court for trial and for advance in-

spection of defense counsel. In this case it was highly important to examine the writings and compare them and to determine facts regarding the applications made by the various witnesses for loans. This right, we think, is guaranteed by Rule 1617-C, Federal Rules of Criminal Procedure and Rule 45-B, Federal Rules of Civil Procedure. See *Bowman Dairy Company v. United States*, 341 U. S. 214, as modified by the Supreme Court this term in *Jencks v. United States*.

If the Government declines to produce the documents thus subpoenaed it should be placed in the same position as in the case of *Jencks v. United States*, 23 Decisions of the United States Supreme Court of October Term, 1956.

In *Jencks v. United States*, Mr. Justice Brennan, speaking for the Court said on June 3, 1957:

“We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce for the accused’s inspection and for admission into evidence, relevant statements or reports in its possession of Government witnesses touching the subject matter of their testimony at the trial. Accord, *Roviaro v. United States*, 353 U. S. 53, 60-61. The burden is the Governments, not to be shifted to the trial judge to decide whether public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of State secrets and other confidential information in the Government’s possession.”

By analogy if the Government chose not to produce the documents in its possession which were relevant and the material to the defendants preparation of their trial and chose to stand upon a motion to quash the subpoena, they should be compelled to dismiss the case in this instant and we so move this Honorable Court.

VII.

Title 18, Section 1010, United States Code, Has Been Unconstitutionally Construed and Applied, and Is Inherently Unconstitutional in Violation of the Due Process Clause of the Fifth Amendment as Being Too Vague, Indefinite, and Uncertain.

A statute to be constitutional must not be vague and indefinite.

Jordan v. De George, 341 U. S. 223;

Williams v. United States, 341 U. S. 97;

Larozettos v. New Jersey, 306 U. S. 451;

United States v. Cohen Grocery Co., 255 U. S. 81;

United States v. Wursbach, 280 U. S. 396.

VIII.

The Section Regarding False Statements Requires the Application of the Two Witnesses Rule, as in Perjury Prosecutions. The Court Failed to so Instruct the Jury.

In this circuit the court has held that one witness is sufficient for the making of a false statement, but that rule was challenged in the United States Supreme Court in the case of *Gold v. United States*, 137, Oct. term, 1956, and has remained unanswered by that court. We ask the Honorable Court to re-examine the rule.

In *United States v. Levin*, 133 Fed. Supp. 88, the court said, in interpreting the Congressional intent:

“[1] If the statute is to be construed as contended for here by the United States, the result would be far-reaching. The age-old conception of the crime of perjury would be gone. 18 U.S.C.A. §1621. Any person who failed to tell the truth to the myriad of government investigators and representatives about any matter regardless, of how trivial, whether civil or criminal, which was within the jurisdiction of a department or agency of the United States, would be guilty of a crime punishable with greater severity than that of perjury. In this case the defendant could be acquitted of the substantive charge against him and still be convicted of failing to tell the truth in an investigation growing out of that charge, even though he was not under oath. An inquiry might be made of any citizen concerning criminal cases of a minor nature, or even of civil matters of little consequence, and if he wilfully falsified his statements, it would be a violation of this statute. It is inconceivable that Congress had any such intent when this portion of the statute was enacted. A literal construction of a statute is not to be resorted to when it would bring about absurd consequences, or flagrant injustices, or produce results not intended by Congress. *Sorrells v. United States*, 287 U. S. 435, 446, 53 S. Ct. 210, 77 L. Ed. 413. The lack of this intention is clearly illustrated from the fact that numerous statutes have been passed which authorize agents of different departments and agencies of the United States to administer oaths to those from whom they are seeking information. 5 U.S.C.A. §93, authorizes an officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud the government or

any irregularity or misconduct of any officer or agent of the United States to administer an oath to any witness called to give testimony. This authority was extended in 5 U.S.C.A. §93a. Special authority to administer oaths in the course of an investigation is given in the following statutes:

“5 U.S.C.A. §521 (Officers of Department of Agriculture who are designated by the Secretary); 5 U.S.C.A. §498 (Investigators with the Department of Interior); 7 U.S.C.A. §420 (Secretary of Agriculture or any representative authorized by him in the administration of the Cotton Futures Act, Grain Standards Act, Warehouse Act, and Standard Containers Act); 8 U.S.C. §152, now 8 U.S.C.A. §§1225(a), 1357(b) (Immigration inspectors with respect to aliens); 12 U.S.C.A. §481 (Federal Bank Examiners in examination of federal banks or affiliates thereof); 18 U.S.C.A. §4004 (Wardens, superintendents, and associates wardens of Federal Penal Institutions); 19 U.S.C.A. §1486 (Customs officer, chief assistants or any employee of the Bureau of Customs designated by the Secretary of the Treasury, or in their absence, postmasters or assistant postmasters in matters involving less than \$100); 26 U.S.C.A. §§3632(a) and 3654(a) (Collector, Deputy Collector of Internal Revenue, and agents and officers making investigations); 42 U.S.C.A. §272 (Medical Quarantine Officers of United States).”

IX.

The Verdicts Are Contrary to the Law and the Evidence. The Evidence Is Insufficient to Support the Verdicts.

- (a) **The Acquittal of Irving Shayne on All Substantial Counts Necessarily Acquitted Him of the Conspiracy Count where the Prosecution Relies on Them to Establish the Conspiracy.**

Where the conspiracy is founded upon the overt acts and the defendant is acquitted of all of the overt acts which necessarily embody the conspiracy, he is, in effect, adjudicated not guilty of the conspiracy.

Ex parte Johnson, 3 Cal. 2d 32;

Oliver v. Sup. Ct., 92 Cal. App. 94.

The principle of *res adjudicata* would also apply since the acquittal of the substantive counts which necessarily include the lesser part of conspiracy would answer the question.

Scalfon v. United States, 332 U. S. 575.

- (b) **Since Only the Two Defendants Were Specified in the Bill of Particulars, Acquittal of Irving Shayne Would Require Acquittal of Max Shayne on the Conspiracy Count.**

One only person cannot be guilty of a conspiracy.

Gross v. United States, 136 F. 2d 875.

- (c) **The Statement, if False, Was Not Made by the Defendant, the Statement Was the Independent Act of the Loan Applicant.**

There is no proof that the loans were not the result of the independent acts of the borrowers. They were the ones who made out the applications.

(d) The Government Failed to Produce Two Witnesses to Each Alleged "False Statement."

If, as we contend, and as we pointed out earlier in the brief two witnesses are necessary to the false statement, as contended in *Gold v. United States*, 137 October term, 1956, and *United States v. Levin*, 133 Fed. Supp. 88, then the government has failed to produce two witnesses to each alleged false statement and the evidence is insufficient.

X.

The Court Erred in Instructions Given and Refused.

- (a) The Court Erred in Instructing the Jury That There Were Other "Conspirators" When the Government Had Limited the Conspiracy to the Two Defendants.**
- (b) The Court Erred in Failing to Instruct the Jury as to the Provisions of the Bill of Particulars.**

The Court instructed the jury, contrary to the Bill of Particulars, as we pointed out in the statement of facts [R. Tr. 2452], and the prosecutor argued the same [R. Tr. 2293].

Since the Court failed to instruct the jury in accordance with the Government's own bill of Particulars, the defendants were highly prejudiced by such instruction which enlarged the case beyond the limitations.

XI.

Where It Develops That a Juror Who Sat on the Trial Had Defective Hearing and Another Went to Sleep During the Trial, a New Trial Should Have Been Granted.

The motion for a new trial should have been granted on proof (a) that one of the jurors had defective hearing, could not hear without a hearing aid and (2) that one of the jurors fell asleep during the trial and had to be awakened.

(1) One of the basic requirements of a jury trial, as guaranteed by the Sixth Amendment, United States Constitution, is qualified jurors. The duty of first selecting jurors who can hear and have no hearing defects is on the Jury Commissioner. A defendant has a right to presume that he has performed his official duty. Under the Federal Practice, jurors are interrogated by the court. Juror Sampson had defective hearing [R. Tr. 2504-2506]. He wore a hearing aid and when it was off, or the battery not working, he couldn't hear a thing. Nevertheless he was one of the jurors in this case. Discovery of his defect was not made by the defense until the close of the case so it was charged on motion for new trial. The judge denied the motion.

(2) One juror fell asleep during the trial [R. Tr. 2544]. He was awakened, and continued to sit. During the time he was asleep the case was being tried by eleven other jurors, assuming that the juror with defective hearing could be counted. If he could not, the case was being

tried by ten jurors qualified to see and hear and be awake. This was not a trial by a common law jury, as required by the Sixth Amendment, United States Constitution. The guarantee is trial by twelve jurors, who see, hear, feel, know what is going on at all times in the courtroom, and thereafter, based upon what they saw and heard, render intelligent and unanimous judgments thereon.

XII.

The Court Erred in Failing to Grant Judgments of Acquittal on the Conspiracy Count When the Jury Acquitted Irving Shayne of All the Substantive Counts. There Cannot Be a Single Conspirator.

For each of the reasons we have set forth, the Court should have granted judgments of acquittal and we ask this Court now to direct judgments of acquittal to the Court below.

Wherefore, defendants pray for reversal of each and all of the judgments and for directions to the Court below to dismiss the indictment.

Respectfully submitted,

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No. 15406

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MAX SHAYNE and IRVING SHAYNE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Statement of the Case.

An indictment in nine counts was filed on January 4, 1956 [Clk. Tr. p. 213], essentially charging the appellants as follows:

Count I, from June 1952 to April 1953 appellants Max Shayne and Irving Shayne conspired together and with other persons (a) to defraud the United States by causing the Federal Housing Administration to insure and guarantee loans for home improvements by reasons of false and fraudulent written statements which would be made pursuant to said conspiracy and which loans would not otherwise be so insured and guaranteed; (b) to commit certain offenses against the United States in violation of Sections 1010 and 2 of Title 18, United States Code, by causing to be passed, uttered and published certain false statements to lending institutions, for the purpose of obtaining for certain applicants loans and advances of credit from said lending institutions, with the intent that such loans and advances of credit would be offered to and accepted by, the Federal Housing Administration for insurance (a verbatim copy of this count is set forth in the Appendix hereto);

Count II, on April 24, 1953 both appellants Max and Irving Shayne caused to be passed, uttered and published certain false statements pertaining to applicant-borrowers Archie L. Thompson and Viola Thompson in violation of Sections 1010 and 2 of Title 18, United States Code.

Count III, same type of offense as Count II except it occurred on June 10, 1952 in respect to applicant-borrowers Henry E. Green and Martha Green.

Count IV, similar to Count II, except it occurred October 15, 1952 pertaining to applicant-borrowers Mandell Drakes and Moshell Drakes.

Count V, similar to Count II, except Max Shayne alone is charged and it occurred October 3, 1952 pertaining to applicant-borrowers Eligh S. Moore and Vivian Moore.

Count VI, similar to Count II except Max Shayne alone is charged and it occurred September 5, 1952 pertaining to applicant-borrower David L. Hamilton.

Count VII, similar to Count II, except Max Shayne alone is charged and it occurred July 15, 1952 pertaining to John Olsen and Leona Olsen.

Count VIII, similar to Count II, except Max Shayne alone is charged and it occurred June 16, 1952 pertaining to applicant-borrower H. C. Cooper. This count was dismissed by the government [Rep. Tr. 1508].

Count IX, similar to Count II, except Max Shayne alone is charged and it occurred on June 17, 1952 pertaining to applicant-borrowers Earnest C. Johnson and Flordie Mae Johnson.

Prior to plea the defendants filed certain preliminary motions as follows:

A Motion to Dismiss Indictment, filed February 15, 1956 [Clk. Tr. p. 14];

A Motion for Bill of Particulars, filed February 15, 1956 [Clk. Tr. p. 16];

A Motion for Discovery and Inspection, filed February 15, 1956 [Clk. Tr. p. 23];

An Application for an Order Fixing the Time for Production of Documentary Evidence, filed February 15, 1956 [Clk. Tr. p. 29]; and

A *subpoena duces tecum* directed to Laughlin E. Waters, United States Attorney for the Southern District of California, to effect the objects of the foregoing [Clk. Tr. pp. 30-31].

All the above motions were duly opposed by the Government together with a statement of grounds and supporting authorities [Clk. Tr. pp. 36-68].

On March 12, 1956 these matters were heard by the trial court and certain relief requested by the defendants was granted and certain relief requested by the defendants was denied [Clk. Tr. p. 69]. A Bill of Particulars was filed by the Government on April 25, 1956 [Clk. Tr. p. 70 *et seq.*].

On May 1, 1956 the defendants entered a plea to each of the counts in which they were charged of not guilty [Clk. Tr. p. 74].

Trial was commenced on Monday, August 27, 1956 [Rep. Tr. p. 2] and resulted in a verdict of guilty against Max Shayne as to Counts I, II, III, V, VI, VII, and IX, on September 19, 1956 [Clk. Tr. p. 207] and in a verdict of guilty against Irving Shayne on Count I, on September 20, 1956 [Clk. Tr. p. 208].

A Motion for a New Trial was made on behalf of both defendants, filed September 24, 1956 [Clk. Tr. p. 210] and additional grounds for the motion of new trial on the basis of newly discovered evidence was filed on October 5, 1956 [Clk. Tr. p. 224]. The Motion for New Trial was denied on October 8, 1956 and the defendants sentenced to five years' imprisonment each as to Count I, concurrent sentences of two years each were imposed on all substantive counts of which Max Shayne had been found guilty [Clk. Tr. p. 232]. Judgments of conviction were duly entered against Max Shayne and Irving Shayne on October 8, 1956 [Clk. Tr. pp. 233-234]. A Notice of Appeal was filed on behalf of both defendants on October 8, 1956 [Clk. Tr. p. 235].

Statement of Facts.

Certain contentions of Appellants require a relatively complete statement of facts. The following is the principal evidence upon which the Government relies.

For convenience in organization only, at trial, the exhibits of the Government were numbered in consecutive order followed by the Roman numeral of the count of the indictment to which they were directly related. The position of the Government at all times has been, however, that all the evidence was applicable to the conspiracy, Count One [Rep. Tr. p. 446].

The FHA Title I credit applications of seven home owners were introduced into evidence. The home owners were Henry E. and Martha Green (application in name of Harry and Margret Greene), Earnest C. and Flordie Mae Johnson, John W. and Leona Olsen, David L. and Sylvia A. Hamilton, Eligh S. and Vivian Moore, Mandell and Moshell Drakes, and Archie L. and Viola Thompson [Exs. 5-III, 60-IX, 48-VII, 31-VII, 25-V, 11-IV and 1-II respectively; see also appendix for abstracts of these exhibits].

Each of the foregoing was received by a bank in Los Angeles, California, in the usual course of business, loans were made pursuant thereto and FHA Title I Loan Reports were submitted to secure insurance thereon. The proceeds of the loans were paid to the dealer or construction company from whom the bank had received the papers except for the Moore and Hamilton transactions which were direct to applicant and to whom two cashier's checks each were issued with one each of such checks being endorsed back to the dealer and excepting the Thompson transaction where a single check was given out by the bank because no dealer was involved at all [Greene,

Rep. Tr. pp. 1621-1624, 1729-1730, Exs. 6-III, 95-III, 88-III; Johnson, Rep. Tr. pp. 1642-1644, 1651, 1655, 1738-1739, Ex. 91-IX; Olsen, Rep. Tr. pp. 1637-1638, 1737-1738, Exs. 49-VII, 52-VII; Hamilton, Rep. Tr. pp. 1634-1636, Exs. 31-VI, 32-VI, 33-VI, 90-VI; Moore, Rep. Tr. pp. 1626-1629, Exs. 26-V, 27-V, 28-V, 89-V; Drakes, Rep. Tr. pp. 225-228, 241, 245, 248, 262, 263, Ex. 15-IV, 12-IV, 24-IV; Thompson, Rep. Tr. pp. 1607-1609, 1619-1620, 1703, Exs. 94-II, 87-II, and see estimate of Albert Clipper and Son Received by bank on Thompson, Ex. 3-II, Rep. Tr. p. 1620].

Salesmen could secure loans on a direct loan basis by accompanying an applicant-homeowner to the bank [Rep. Tr. pp. 1662-1663, 1665-1666] as in Hamilton, Moore, or Thompson transactions.

Harry R. Nathanson, a stockholder and vice president of Commercial Improvement Company, who acted as sales manager for this company from November of 1951 until just prior to their quitting business in June of 1953 [Rep. Tr. pp. 1064-1065], first saw Max and Irving Shayne in May of 1952 [Rep. Tr. p. 1072].

At a conversation, occurring in May or June of 1952, with Max Shayne, Irving Shayne and Nathanson present, the Shaynes advised Nathanson that they wished to bring in a different type of work than what was ordinarily handled by the Commercial Improvement Company, such as electrical work, plumbing work, carpentry, or painting [Rep. Tr. pp. 1175-1177]. The regular work performed by Commercial Improvement Company was the placing of mastic on the exteriors of homes and they did no other work with their own employees [Rep. Tr. p. 1073].

At the foregoing conversation Nathanson told the Shaynes that they would have to see this different type work through to completion. Nathanson further advised the Shaynes that Commercial Improvement Company had no subcontractors which could perform such work. In reply to this the Shaynes advised Nathanson that they could get the subcontractors, had been using them before, and would see that the work was performed. The Shaynes further advised that they would handle the entire transaction [Rep. Tr. pp. 1178-1179].

Both Max and Irving Shayne started turning in work to the Commercial Improvement Company in June of 1952 [Rep. Tr. pp. 1073, 1077-1078, 1188].

Wherever subcontractors were involved in the accounts brought in by the Shaynes these subcontractors were selected by the Shaynes [Rep. Tr. pp. 1080, 1338]. The Shaynes further had full authority to supervise in full contracts they brought in to the Commercial Improvement Company [Rep. Tr. pp. 1409-1410].

Payment of the invoices of the subcontractors was not made until completion certificates were brought in by the Shaynes which had been signed by the home owners [Rep. Tr p. 1402]. The note, the contract of the home owner with Commercial Improvement Company, and the credit application of the home owner were all received at one time and forwarded to the lending institution by Commercial Improvement Company [Rep. Tr. p. 1246].

The Greene account was brought to Commercial Improvement Company by the Shaynes and they selected the subcontractor, Smith & Company, whose invoice [Ex. 9-III] was paid by Commercial by its check [Ex. 65-III]. Nathanson had no personal knowledge of this

subcontractor and never sent work out to them. Max and Irving Shayne received \$466.66 commission on this account [Rep. Tr. pp. 1080-1088, 1243-1244, 1260-1261, Exs. 7A and 7B-III].

The Drakes account was handled by Commercial Improvement Company and was brought to them by the Shaynes [Rep. Tr. pp. 1089, 1091]. The contract in this matter [Exs. 12 and 12A-IV, Rep. Tr. p. 1093] called for work to be done which would be handled by a subcontractor [Rep. Tr. p. 1090]. Commercial Improvement Company received an invoice by the subcontractor James J. Marsh [Ex. 21-IV]. Nathanson had no knowledge of Marsh [Rep. Tr. pp. 1090-1091]. Marsh was paid by check for the amount set forth in this invoice [Rep. Tr. pp. 1094, 1273, Ex. 23-IV]. A \$240 commission was credited on this account to Max and Irving Shayne [Rep. Tr. p. 1280].

The Olsen transaction was also brought to Commercial by the Shaynes [Rep. Tr. p. 1095]. The contract between Olsen and Commercial [Exs. 51-VII and 51A-VII, Rep. Tr. p. 1098] covered work which was not ordinarily performed by Commercial Improvement Company employees [Rep. Tr. p. 1095]. This company received an invoice of the subcontractor, George Angerson, covering this work [see Ex. 54-VII, Rep. Tr. p. 1096], which was paid by Commercial Improvement Company's check [Ex. 66-VII, Rep. Tr. p. 1096]. Nathanson did not know George Angerson and so far as he was aware, Angerson had never been to the office [Rep. Tr. pp. 1096, 1103]. A \$400 commission was paid by Commercial Improvement Company to the Shaynes' credit on this account [Rep. Tr. p. 1306].

Mr. Novak, president of Commercial Improvement Company, corroborated Nathanson in respect to the Shaynes' selecting Angerson as a subcontractor rather than the Commercial Improvement Company selecting him. Novak stated that he had never seen or known Angerson [Rep. Tr. pp. 2032-2033].

On all three of the foregoing accounts of Commercial Improvement Company the Title I credit applications were brought in by the Shaynes and forwarded to the bank [Rep. Tr. pp. 1098-1099, 1100-1103].

The Commercial Improvement Company also handled the Johnson transaction, brought to them by the Shaynes [Rep. Tr. pp. 1106-1107]. An original credit application was received by them [Rep. Tr. pp. 1128-1129], and the Company also received an invoice of the subcontractor, George Angerson [Rep. Tr. p. 1130, Ex. 63-IX]. Commercial Improvement Company drew two checks in relation to this account. One check was in payment of the foregoing invoice of George Angerson [Rep. Tr. pp. 1131-1132, Ex. 57-IX] and the other was drawn in favor of the Johnsons in the amount of \$800, which appears to be in payment of the second paragraph of the contract between the Johnsons and Commercial [Rep. Tr. p. 1129, Ex. 62-IX; Rep. Tr. pp. 1133-1134, Exs 61-IX and 61A-IX].

In addition to the foregoing Commercial received, in the usual course of business, documents listed below. In each instance, the account was one that had been brought to Commercial Improvement Company by the Shaynes, the subcontract was one selected by the Shaynes, and the documents were the invoice of the subcontractor and the check of Commercial paying the invoice as follows:

Andrew Burton account [Rep. Tr. pp. 1137-1138, 1140-1141, Exs. 68-I and 69-I]. The Shaynes were shown to have received a \$280 commission on this transaction [Rep. Tr. pp. 1206-1207].

Harrison M. Black account [Rep. Tr. pp. 1139-1140, 1146-1148, 1309, Exs. 71-I and 70-I].

Herrema account [Rep. Tr. pp. 1148, 1150-1151, 1326, Exs. 72-I and 73-I].

Sherman Green account [Rep. Tr. pp. 1149, 1152, 1168, Exs. 74-I and 75-I].

Lessie House account [Rep. Tr. pp. 1168-1170, Exs. 76-I and 77-I].

Blaine Selby account [Rep. Tr. p. 1170, Exs. 78-I and 79-I].

H. C. Cooper account [Rep. Tr. pp. 1173-1174, Exs. 80-I and 81-I].

The foregoing exhibits will be referred to later in this statement of facts, particularly in relation to testimony of Mr. Mesnig of the F.B.I. laboratory.

Sponseller & Sons was a partnership engaged in general home construction [Rep. Tr. pp. 648-649]. Max and Irving Shayne worked for them from the early part of 1952 through the first part of 1953 as salesmen, selling jobs in the home construction field [Rep. Tr. pp. 649-650, 661]. The Shaynes worked together on all jobs they turned in to Sponseller and they shared commissions equally [Rep. Tr. p. 743]. They were paid commission on each job, receiving two-thirds of the profit and Sponseller receiving one-third [Rep. Tr. p. 650]. The Shaynes shared equally between themselves in all jobs submitted to Sponseller [Rep. Tr. p. 651A].

Mr. Sponseller identified the Moore account [Rep. Tr. p. 653, Ex. 29-V]; the Hamilton account [Rep. Tr. pp. 654-655, Ex. 35-VI]; and additional accounts of Benjamin Dickson (Dixon) [Rep. Tr. p. 655] and Ocie Larks [Rep. Tr. p. 655], as ones in which the Shaynes had picked the subcontractors which were to perform all or a part of the work [Rep. Tr. pp. 662, 677, 724].

In the Moore transaction, Sponseller had received an agreement [Ex. 43-V], a release of lien [Ex. 42-V], and a statement of invoice [Ex. 40-V] purportedly signed by the subcontract George Angerson. In response to the invoice, Sponseller had made payment by its check [Ex. 41-V]. Irving and Max Shayne were the salesmen that brought this account to Sponseller [Rep. Tr. pp. 669-670, 673-674]. The credit application on this account was sent to the bank [Rep. Tr. p. 725].

The Hamilton transaction was an account secured by the Shaynes for Sponseller [Ex. 35-VI and copy thereof, Ex. 35A-VI, Rep. Tr. pp. 675, 699-700]. For this account Sponseller received an invoice of a subcontractor by the name of Louis Perlman, Exhibit 36-VI [Rep. Tr. p. 676]. Sponseller paid the invoice by check [Ex. 39-VI, Rep. Tr. p. 676]. The credit application was sent to the bank [Rep. Tr. p. 725].

There were two parts to the work to be performed on the Hamilton home. The contract with Sponseller called for exterior painting or mastic job [see Ex. 35-VI] and this was done by a subcontractor selected by Sponseller, but the linoleum work was to be performed by a subcontractor picked by the Shaynes [Rep. Tr. p. 704]. No inspection was made by Sponseller as to whether or not the linoleum was placed in the premises [Rep. Tr. p. 705].

The Hamilton work would only be checked as to the painting by Sponseller [Rep. Tr. p. 736].

In the Benjamin Dickson (Dixon) account, a job secured by Max and Irving Shayne, the invoice of the subcontractor, George Angerson [Ex. 45-I] and the check in payment thereof [Ex. 44-I] were identified by Mr. Sponseller [Rep. Tr. pp. 680-684].

The Ocie D. Larks account was a job secured for Sponseller by Max and Irving Shayne [Rep. Tr. p. 681]. An invoice was received by Sponseller from George Angerson [Ex. 47-I] and a check was made in payment therefor [Ex. 46-I, Rep. Tr. p. 685]. This subcontractor was selected by Max and Irving Shayne [Rep. Tr. p. 686].

Earl Sponseller had never seen George A. Angerson and was not acquainted with him [Rep. Tr. p. 686].

All four of the foregoing transactions with Sponseller were FHA transactions [Rep. Tr. p. 687].

George F. Mesnig, a qualified examiner of questioned documents for the FBI [Rep. Tr. p. 1517] examined the following subcontractors' invoices received on the accounts of the dealers as listed:

Exhibit 9-III, Smith & Company, Greene account, Commercial Improvement Company.

Exhibit 68-I, George Mitchell, Burton account, Commercial Improvement Company.

Exhibit 78-I, George Angerson, Blaine Selby account, Commercial Improvement Company.

Exhibit 77-I, George Angerson, Lessie House account, Commercial Improvement Company.

Exhibit 74-I, George Angerson, Sherman Green account, Commercial Improvement Company.

Exhibit 73-I, George Angerson, Herrema account, Commercial Improvement Company.

Exhibit 70-I, George Angerson, Harrison Black account, Commercial Improvement Company.

Exhibit 63-IX, George Angerson, Johnson account, Commercial Improvement Company.

Exhibit 40-V, George Angerson, Eligh Moore account, Sponseller & Sons.

Exhibit 45-I, George Angerson, Ben Dickson (Dixon) account, Sponseller & Sons.

Exhibit 47-I, George Angerson, Ocie Larks account, Sponseller & Sons.

Exhibit 54-VII, George Angerson, John Olsen account, Commercial Improvement Company.

Exhibit 80-I, George Angerson, H. Cooper account, Commercial Improvement Company.

In the opinion of Mr. Mesnig, all the foregoing subcontractors' invoices were prepared on one typewriter [Rep. Tr. pp. 1520, 1521, 1536-1537, 1565].

The George Angerson invoices bear address 1617 South Ariington and telephone number RE 5610; the George Mitchell invoice bears address 10822 Croesus Avenue and telephone number LO 9-5797, and the Smith & Company invoice bears address 816 E. Jefferson Street and telephone number CE 2-6950 [see foregoing exhibits].

In connection with Angerson signatures, Mr. Mesnig also testified that a subcontract agreement [Ex. 42-V], a lien release [Ex. 43-V], and ten checks drawn payable to George Angerson by the Commercial Improvement Company and Sponseller & Sons in payment of the foregoing invoices, *bore at least four different signatures or endorsements of the name George Angerson* [Rep. Tr.

pp. 1538-1539]. These exhibits, grouped by Mesnig according to the different individuals writing the signature or endorsement George Angerson, were:

Group I —Exhibits 72-I, 43-I, 42-I.

Group II —Exhibits 79-I, 76-I, 66-VII.

Group III—Exhibits 75-I, 71-I.

Group IV—Exhibit 44-I.

In addition to the foregoing, Angerson signatures on Exhibits 46-I, 67-IX and 81-I could not definitely be identified with any of the first four groups [Rep. Tr. pp. 1539-1541, 1550-1553].

The Government offered evidence that it had made an extensive but unsuccessful attempt to locate George Angerson [Rep. Tr. pp. 1593-1600].

George Mitchell was called to the stand and testified that he resided at 10822 Croesus Avenue, Los Angeles, and had resided at this address ever since 1943 or 1944 [Rep. Tr. pp. 1426, 1440]. Mr. Mitchell was shown Exhibit 68-I which bears his name and his address, a subcontractor's invoice heretofore identified. Mitchell testified that he received a stack of these forms from Max Shayne on an occasion when Irving Shayne was also present [Rep. Tr. pp. 1427, 1436-1437, 1448]. Max told Mitchell to use the form in his business, but Mitchell had never asked for them and never used any of them [Rep. Tr. pp. 1427-1428]. The signature on Exhibit 68-I, the invoice, was not that of Mitchell [Rep. Tr. p. 1428].

He had, however, worked on the premises covered by this invoice at 1829 East 111th Street, but had not worked on these premises for Max Shayne, having done the work for Jim Gamble when the house was first being constructed [Rep. Tr. pp. 1429-1430, 1449, 1441].

On the dealer's check in payment for this invoice, Exhibit 69-I, the endorsement George Mitchell was not signed by the witness George Mitchell [Rep. Tr. p. 1431]. Mr. Mitchell further testified he had never owned a typewriter nor used one [Rep. Tr. pp. 1437-1438], and he further testified that the work he did on the house covered by the invoice was done before he had met the Shaynes [Rep. Tr. p. 1457].

Charles Neiberg ran a service station in 1952 and Max Shayne and Irving Shayne were his customers [Rep. Tr. p. 1474]. When shown Exhibits 65-III, 66-VII, 79-I and 76-I, which were checks of Commercial Improvement Company to Smith & Company, and to George Angerson, subcontractors, Neiberg testified that his signature appears as the second endorsement on the reverse side [Rep. Tr. p. 1475]; that Max Shayne brought these checks to him and asked to have them cashed while Irving Shayne was present [Rep. Tr. p. 1476]. Charles Neiberg didn't cash the checks himself but took them to the bank with Max, with Irving Shayne coming along once or twice [Rep. Tr. pp. 1476, 1493].

The endorsement "George Angerson" on the three checks made payable to Angerson were signed by Neiberg. After cashing these checks at the bank the proceeds were given to Max [Rep. Tr. pp. 1476-1477]. Neiberg didn't know George Angerson [Rep. Tr. pp. 1477, 1488].

When shown Exhibit 69-I, a Commercial Improvement check payable to George Mitchell, a subcontractor, Neiberg testified that he signed that name [Rep. Tr. p. 1478]. Neiberg recalled that the bank wouldn't cash this check for some reason when it was presented, and so it was given back to Max Shayne [Rep. Tr. pp. 1478-

1479, 1492-1493]. Neiberg didn't know George Mitchell and had seen him for the first time when he was a witness on the stand.

All the checks were cashed under similar circumstances, with the exception of the Mitchell check being returned to Max, over a period of a few months in 1952 [Rep. Tr. p. 1485]. Neiberg also testified that one endorsement is in blue ink and one endorsement is in black because he used two pens, his own and Max Shayne's [Rep. Tr. pp. 1487, 1492-1494]. All checks were signed at the gas station [Rep. Tr. pp. 1495-1496].

In regard to the Smith & Company invoice, Lizzie B. Perry, who had lived at the address shown for the subcontractor on the invoice, for nine years, recalled only one roomer during that period who lived there by the name of Smith and that was Alvin P. Smith. Perry had known Max and Irving in 1952 and they had used her telephone, the number of which was on the invoice [Rep. Tr. pp. 1225-1228].

The Alvin P. Smith, referred to above, testified he lived at this address during 1952, never did business as Smith & Company, and didn't know the Shaynes. He did not recognize the invoice [Rep. Tr. pp. 1233-1234].

In June of 1952, Max and Irving Shayne called upon Henry E. Green and Martha Green [Rep. Tr. pp. 99-100, 105]. A conversation took place between the Shaynes and the Greens [Rep. Tr. pp. 105-106]. Mr. Green told both the Shaynes that he owed six to eight payments on his home [Rep. Tr. pp. 103-104], that he had not been regularly employed from 1949 to June of 1952 [Rep. Tr. pp. 104, 150-151] and that he needed \$800 to get his home out of foreclosure [Rep. Tr. pp. 106-107, 109]. Max Shayne told Green that he would

get him \$800 if Green would agree to pay back \$1600 [Rep. Tr. p. 109].

Some time later both Max and Irving Shayne came to Green's house and Green was given eight one-hundred dollar bills by Max [Rep. Tr. pp. 112-113]. Mr. Green testified there was no conversation with the Shaynes about work to be done on his home and in fact no work was ever done [Rep. Tr. p. 118]. When shown the Smith & Company invoice [Ex. 9-III], Mr. Green stated the work address was that of his home as of June 1952 but none of the work listed on said invoice had ever been performed [Rep. Tr. pp. 121-122].

Green testified that he was never asked to sign any papers for the loan [Rep. Tr. p. 111] but that his wife signed some papers the day they received the eight one-hundred dollar bills [Rep. Tr. p. 113]. Mr. Green further denied that FHA Title I credit application [Ex. 5-III] contained genuine signatures of either himself or his wife [Rep. Tr. p. 117]; denied that the contract with Commercial Improvement Company [Exs. 7A-III and 7B-III] was signed by either him or his wife [Rep. Tr. pp. 120-121].

Approximately three weeks after receiving the eight one-hundred dollars bills, Mr. Green received a telephone call from a bank. He called Max Shayne on the telephone and told him about the call from the bank and that he had received a book and contract from the bank [Rep. Tr. p. 124]. Green stated that he told Max that he did not have an FHA contract with anybody and that Max told him it was all right, just go ahead and make the payments. There was further discussion about the contract and payment book being in the name of Harry Greene and Margret Greene and Max told Green in ef-

fect that the difference in the names was not important [Rep. Tr. p. 125].

The FHA Title I credit application calls for improvements to the home costing \$1600 [Ex. 5-III] and shows the address of the Greens.

Donne Mire, a handwriting expert for the defense, gave his opinion that Henry Green had signed the documents in the Greene matter, but from certain matters raised on cross-examination the jury could have disbelieved this [Rep. Tr. pp. 2203-2204, 2213-2216, 2221].

Earnest Cornell Johnson testified that in June of 1952 he had conversations with Max Shayne about a loan which occurred at his residence located at 10525 Avalon Boulevard, Los Angeles, California [Rep. Tr. p. 909]; the substance of which was to the effect that a Mrs. Whitfield, now Mrs. Martin, a member of the church in which Mr. Johnson was pastor, wanted a loan [Rep. Tr. p. 910]; that Max Shayne had taken Mrs. Whitfield's credit application [Rep. Tr. pp. 913-914] but that her credit was inadequate. Max advised Johnson that the loan could be made if Johnson would make application for it [Rep. Tr. pp. 915-916, 989].

Max Shayne was advised that \$800 was needed to pay an overdue indebtedness on the first and second trust deeds on Whitfield's property [Rep. Tr. pp. 918-919, 992]. After Johnson had agreed to make the loan application for Mrs. Whitfield, he signed some papers [Rep. Tr. p. 919].

Johnson identified his own and his wife's signatures on Exhibit 60-IX, the credit application. He stated that it had been signed when present with Shayne but was not completed [Rep. Tr. pp. 921-922, 1034]. Johnson fur-

ther testified that his wife and himself had signed Exhibit 61-IX at the time they were talking to Shayne [Rep. Tr. p. 923]. All documents upon completion or signing were taken by Max Shayne [Rep. Tr. pp. 928, 947] and all documents had been filled in by Max Shayne [Rep. Tr. p. 930].

Exhibit 60-IX, the Title I credit application, shows the property to be improved as 1239 East 127 Street and sets out work to be performed at a cost of \$1300.

Exhibit 61-IX is a contract between Commercial Improvement Company and the Johnsons setting forth work in two paragraphs for a total contract price of \$1300. The first paragraph requires the painting of the interior of the house and the second paragraph requires the remission to the Johnsons of \$800 cash for an additional room.

The subject of improvements to Johnson's home was not mentioned but the painting of the interior of the Whitfield home was a subject of discussion between Johnson and Max Shayne [Rep. Tr. pp. 934-935, 945, 1011]. The portion of the contract with Commercial Improvement Company [Ex. 61-IX] circled in red, which is the second paragraph calling for the remission of \$800 to Johnson, was not written on this document at the time he signed it [Rep. Tr. pp. 936, 971-972]. No additional room was put on the Whitfield house and there was no conversation on this subject with Max Shayne [Rep. Tr. pp. 951, 960-961]. However, Johnson intended to do some painting on the home located at 1239 East 127th Street [Rep. Tr. p. 946].

Max Shayne told Johnson that FHA money could be used to pay up first and second trust deeds and that it

did not have to be used for improvements [Rep. Tr. pp. 954, 1013].

Some time after the early conversations with Max, Johnson received \$800 in cash from him after Johnson and his wife had endorsed Exhibit 62-IX, a check of the Commercial Improvement Company for that sum, which check was delivered to the Johnsons by Max [Rep. Tr. pp. 947, 1019]. Johnson used six to seven hundred dollars of the \$800 received to pay on deeds of trust on the Whitfield property. The balance of the money was used to paint the interior of this property [Rep. Tr. p. 948].

Johnson testified he had never known a person by the name of George Angerson [Rep. Tr. p. 949], a subcontractor, identified above with this transaction, whose invoice covers the painting [Ex. 63-IX].

John Olsen, in July of 1952 lived at 2606 E. 121st Street, Willowbrook, California, where he had a discussion with Max Shayne [Rep. Tr. p. 770]. They talked about borrowing money and Max said he could arrange a loan but it would cost Olsen double. Olsen advised Shayne that he needed \$600 [Rep. Tr. p. 773] to stop the foreclosure on his home and Max responded that he could probably get the money [Rep. Tr. pp. 774-775].

Approximately a week later, Olsen saw Max Shayne again [Rep. Tr. p. 777]. At this time, Olsen and his wife signed Exhibit 48-VII, a Title I credit application, dated July 12, 1952, calling for certain work to be performed on the home as follows: "Exterior Painting, Repair Plumbing" for a cost of \$1200 [Rep. Tr. p. 779, Ex. 48-VII]. Other than a signature, this document was not filled in by either Olsen or his wife [Rep. Tr. p. 779].

Olsen and his wife also signed the bank note [Ex. 49-VII, Rep. Tr. p. 780] and a contract with Commercial Improvement Company [Exs. 51A-VII and 51-VII] but this contract was not filled in by either Olsen or his wife [Rep. Tr. pp. 781-782].

All the foregoing documents were given to Max Shayne [Rep. Tr. p. 783] after he had said they were necessary [Rep. Tr. p. 792]. In further conversations Max Shayne told Olsen that he, Max, would make the payments on Olsen's mortgage which were approximately \$600. Olsen received in cash approximately \$60 from Max [Rep. Tr. pp. 784-785, 795]. During these conversations, Max also told Olsen that if anybody came out to do improvements on the home, Olsen was to say they had already been done or not to let them do anything. No plumbing or painting had ever been done on the house except for \$20 to \$30 worth of painting performed by Olsen himself in about a week's work [Rep. Tr. pp. 786, 826].

Exhibit 54-VII, an invoice on the letterhead of George Angerson, dated July 17, 1952, called for the same work as in the foregoing contract and Title I credit application, which purports to acknowledge payment of \$600 for such work being performed [see Ex. 54-VII], was exhibited to Olsen and he stated that none of the work listed was ever performed on his home [Rep. Tr. p. 794]. Olsen did not know George Angerson and Angerson never did any work on his home [Rep. Tr. p. 790].

Olsen testified that the initial meeting with Max Shayne came about after he had gone to Southwest Realty Company to secure a refinancing of his home and they advised him they would send out the "Money Man." Thereafter, in approximately a week, May Shayne came to Olsen's home [Rep. Tr. p. 809].

Evidence was introduced that showed a payment of \$529.30 on Olsen's mortgage was made by a check drawn on Max Shayne's personal account [Rep. Tr. pp. 848-855, 879-883, 886-892, Exs. 56-VII, 57A-VII, 57B-VII, 55-VII, 58-VII].

Sylvia Hamilton and David L. Hamilton, husband and wife, met Max Shayne at their home in September, 1952, at a time when they resided at 17440 Tiara, Encino, California [Rep. Tr. pp. 391-392, 477-479]. The Hamiltons had a conversation with Max Shayne in which they advised him that they wished to borrow \$700 to pay their bills, including delinquent house payments. Max advised that he could get the money if they had some improvements made to their home. The Hamiltons decided to have the outside of the house painted [Rep. Tr. pp. 394-398, 404, 428-429, 480-484, 506]. They signed a Title I credit application and a contract with Sponseller & Sons [Rep. Tr. pp. 400-401, 429-431, 484, Exs. 31-VI, 35-VI].

One paragraph in the above contract was not discussed with Max Shayne and the work was never performed. This paragraph of work calling for interior work was added to the contract after it was executed and the same is true of the credit application. The added portion deals with putting linoleum in the kitchen and bath. No such work was ever performed on these premises. Only the exterior of the house was painted [Rep. Tr. pp. 429-431, 433, 434, 485-487, 496, 497-498, 501, 419, Exs. 31-VI, 35-VI].

Max took the signed papers away with him [Rep. Tr. pp. 485-487, 404].

At the time of their meeting the Hamiltons told Max Shayne that they were two payments behind on the house.

Max gave the Hamiltons \$100 cash to cover the Hamiltons' personal check for \$102 which was delivered to Max and which Max said he would pay on the back house payments [Rep. Tr. pp. 407-408, 410-411, 493, Ex. 34-VI, personal check of Hamiltons].

After Max Shayne telephoned and said the loan had been approved [Rep. Tr. pp. 513-515], the Hamiltons went to Leimert Park Branch of Citizens National Bank where they met a man that Mrs. Hamilton could not identify but which David L. Hamilton said was Irving Shayne. The Hamiltons were told not to say anything, just sign papers, which they did, and received two checks; one for \$880 and one for \$700. The \$700 check was cashed by the Hamiltons and the \$100 advanced by Max was paid back to Irving [Rep. Tr. pp. 411-416, 489-490, 535, 490-493].

The \$600 left out of the \$700 check was used to pay personal bills [Rep. Tr. pp. 416-420, 426-427, 498-499].

The \$880 check was endorsed to Sponseller and given to Irving Shayne [Rep. Tr. pp. 490-493].

Louis Perlman had known Max and Irving Shayne since 1950 and had done a number of different jobs for them [Rep. Tr. p. 602]. Perlman identified the invoice [Ex. 36-VI], which purports to cover the work of laying linoleum in the Hamilton home as being an estimate that he made up for such work after receiving the dimensions over the phone from either Max or Irving Shayne [Rep. Tr. p. 605] but he did not do the work [Rep. Tr. p. 606] as determined by his physical inspection of the premises only a few days before trial [Rep. Tr. p. 607].

Perlman stated that he had never received payment for this job and that he endorsed the check in payment of

The check in payment of this \$1030 [Ex. 23-IV] is not endorsed by Marsh, the endorsement has the wrong spelling for his name, and the check was not cashed by Marsh [Rep. Tr. pp. 212-213].

Marsh knew the Shaynes did business under the name "Money Man" and had seen them use the same identical card as given to the Drakes. This business card has the same telephone number as the one Marsh had on his work-books for the Shaynes [Rep. Tr. pp. 214-217, Exs. 14-IV, 22-IV].

Archie L. Thompson and his wife, Viola Thompson, resided in a house behind a restaurant which was located at 10962 South Avalon Boulevard in the spring of 1953 and they owned a home at 5126 Towne Avenue, Los Angeles which was the property to be improved as shown by their credit application [Rep. Tr. p. 3, Ex. 1-I]. While Archie was working on the restaurant roof Max and Irving Shayne arrived together and conversed with him asking if he needed money and Thompson told them that he did to complete the work on the restaurant [Rep. Tr. pp. 4-7, 40].

A day or so later, the Thompsons signed a Title I credit application [Ex. 1-I] after it had been filled in by Viola at the Shaynes' direction [Rep. Tr. pp. 8, 10-13, 15-16, 43, 59-61, 78]. The Shaynes then told the Thompsons to take the credit application to Citizens Bank, Leimert Park Branch, together with an estimate that they furnished of Albert Clipper & Son, of work to be done on the house on Towne Avenue [Rep. Tr. pp. 16-17, 20, Ex. 3-II].

Two or three days later the Thompsons went to the bank and received a check for approximately \$2300 which

was deposited to their account at the Bank of America to cover Viola Thompson's personal check for \$895 which she delivered to Irving Shayne [Rep. Tr. pp. 17-19, 21-24, 47, 50, 54-55, 56, 62, 64-65, Exs. 4-II, 94-II]. The \$895 was a fee for securing the loan [Rep. Tr. p. 75] on which there had been prior conversation between both Shaynes and the Thompsons [Rep. Tr. pp. 24-25, 29].

None of the money was to be used on the house on Towne Avenue [Rep. Tr. pp. 16, 28, 52-54] nor was any of the work in the Albert Clipper estimate performed by Clipper or anyone else, this work having been done by Archie Thompson himself at an earlier date [Rep. Tr. pp. 26-28, Ex. 3-II].

Irving Wolf, a brother-in-law to the Shaynes, received the \$895 check [Ex. 4-II] from one of the Shaynes, cashed it, and took the money to the home of one of the Shaynes. He stated he did not recall which Shayne he received it from and by reason of their homes being side by side he did not remember which one he delivered it to [Rep. Tr. pp. 88-89].

The Thompsons' bank account at Bank of America, for April 1953, showed a balance of \$16.04 just prior to a deposit of \$2395 as of April 29, 1953. On April 30, 1953, \$895 was withdrawn from this account [Rep. Tr. pp. 93-97].

In the spring of 1954 there were several meetings and conversations among Irving Shayne, Max Shayne, Louis Novak, president of Commercial Improvement Company, and Meyer Miller, which occurred after Novak and Miller had visited the Los Angeles FHA office. The Shaynes were asked whether or not work was done on the Green (Greene) and Olsen jobs. At first they said the work

was done, but when Miller confronted the Shaynes with what Green and Olsen had told the FHA, the Shaynes admitted that no work was performed, and no work was to be performed.

Miller demanded that the Shaynes repurchase the Green and Olsen notes. The Shaynes offered to put up two-thirds of the money if Commercial would pay the other third. Miller agreed.

At a later prearranged meeting the Shaynes delivered a cashier's check to Novak and Miller but refused to accompany them to the FHA office. The Commercial Improvement Company share was \$1000 made up by Miller, Novak and Nathanson. Payment was made to the FHA [Rep. Tr. pp. 1774-1784, 1807-1808, 1811-1815, 1788, 1790, 1823, 1830, 1832-1836, 1839, 1846-1850, 1853, 1871-1872].

In June of 1954, Max Shayne came to Henry E. Green's home and said that he had straightened out the FHA loan and had paid it [Rep. Tr. pp. 125-128]. Shortly after his conversation, Henry Green received through the mail a payment book for \$1100 [Exs. 10A-III and 10B-III, Rep. Tr. pp. 126-127]. This payment book bears Max Shayne's name, home address, and phone number, calls for payments of \$20 per month at six per cent for a total of \$1100—shows a loan made on May 13, 1954 [Exs. 10A-III and 10B-III].

Summary of Argument.

I.

Rulings on Preliminary Motions (Appellants' Specifications V and VI).

II.

Proof and Pleading of Conspiracy (Appellants' Specification I).

III.

Submitting Indictment to Jury Without Submitting Bill of Particulars (Appellants' Specification II).

IV.

Instructions on Conspiracy (Appellants' Specifications III and X).

V.

Verdicts Contrary to Law and Evidence; Denial of Judgments of Acquittal (Appellants' Specifications IX(a), (b), (c) and (d), and XII).

VI.

Rulings on Motion for New Trial (Appellants' Specifications XI).

VII.

Constitutional Questions (Appellants' Specifications IV and VII).

VIII.

Two Witness Rule on False Statements (Appellants' Specification VIII).

ARGUMENT.

I.

Rulings on Preliminary Motions (Appellants' Specifications V and VI).

A. The Bill of Particulars.

The granting or denial of a bill is discretionary with trial court and his ruling will not be disturbed in the absence of a showing of prejudice.

Wong Tai v. United States (S. Ct., 1926), 273 U. S. 77 at 82;

United States v. Dilliard (2d Cir., 1938), 101 F. 2d 829 at 835;

Olmstead v. United States (9th Cir., 1927), 19 F. 2d 842 at 844;

Sawyer v. United States (8th Cir., 1937), 89 F. 2d 139 at 140, 141;

United States v. McKenna (1954), 126 F. Supp. 831;

Fischer v. United States (10th Cir., 1954), 212 F. 2d 441 at 445;

Schino v. United States (9th Cir., 1953), 209 F. 2d 67 at 69;

Legatos v. United States (9th Cir., 1955), 222 F. 2d 678 at 681.

The ruling, insofar as the bill was denied, was proper because the defense was attempting a full discovery of the Government's case, to reach its evidence, to secure a list of Government witnesses or to secure information from the Government which was equally available to defendants.

United States v. Pillsbury Mills (1955), 18 F. R. D. 91 at 93, 94;

Wong Tai v. United States, supra;

United States v. Shindler (1952), 13 F. R. D. 292 at 295;

United States v. McKenna, *supra*;

United States v. Brennan, 134 F. Supp. 42;

United States v. Wilson (1954), 72 F. Supp. 812, aff'd 176 F. 2d 184, cert. den. 338 U. S. 870;

Hemmelfarb v. United States (9th Cir. 1949), 175 F. 2d 924, cert. den. 338 U. S. 860.

In the absence of surprise there is no prejudice.

United States v. Dilliard, *supra*, at 835;

Rubio v. United States (9th Cir., 1927), 22 F. 2d 766, 767-768;

Kaufman v. United States (6th Cir., 1947), 163 F. 2d 404 at 408;

Wong Tai v. United States, *supra*, at 82;

Shino v. United States, *supra*, at 70;

Lucas v. United States (Dist. Col. 1939), 104 F. 2d 225.

B. Motion for Discovery and Inspection—Rule 16.

Insofar as the Government had obtained anything from the defendants, this motion was granted by the trial court [Clk. Tr. p. 69]. The denial of the balance was within the discretion of the trial judge. There was no showing that any additional matter had been acquired by process or seizure [Clk. Tr. pp. 23-24].

Monroe v. United States, (D. C. Cir. 1956), 234 F. 2d 49;

United States v. Kiamie (1955), 18 F. R. D. 421;

United States v. Peltz (1955), 18 F. R. D. 394.

C. Subpoena for Production of Documentary Evidence
and Objects—Rule 17(c).

Documents which are subject to subpoena under subdivision (c) of Rule 17, Federal Rules of Criminal Procedure, are not also subject to inspection by defendant as a matter of right, but only upon a showing of good cause.

United States v. Iosia, 13 F. R. D. 335.

Production of documents pursuant to Rule 17(c) may be compelled only if the documents are admissible in evidence.

Bowman Dairy Co. v. United States (1951), 341 U. S. 214, 219, 221;

United States v. Iosia (D. C. N. Y., 1952), 13 F. R. D. 335, 338.

Rule 17(c) may not be used to compel the production of the Government's evidence without due reason being shown, nor can it be the vehicle for a general "fishing expedition".

Bowman Dairy Co. v. United States, *supra*, at 221;

United States v. Mesarosh et al. (D. C. Pa., 1952), 13 F. R. D. 180, 183;

United States v. Iosia, *supra*, at 340;

United States v. Maryland & Virginia Milk Producers' Assn. (D. C. D. C., 1949), 9 F. R. D. 509, 510;

United States v. Muraskin, et al. (2d. Cir., 1938), 99 F. 2d 815, 816;

United States v. Rosenfeld (2d Cir., 1932), 57 F. 2d 74, 76-77.

In any event, the pretrial production under *subpoena duces tecum* is discretionary with trial court.

United States v. Schiller (2d Cir., 1951), 187 F. 2d 572 at 575;

United States v. Schneidermann (1952), 104 F. Supp. 405;

United States v. Ward (1954), 120 F. Supp. 57 at 59;

Monroe v. United States, supra.

Appellant refer to the *Jencks* case in their argument on these points. *Jencks* requires only the production of statements taken from witnesses after they have been called to the stand at trial.

Jencks v. United States (S. Ct., 1957), 353 U. S. 657.

In the one instance in this case where defense demanded such a statement it was furnished to them [Rep. Tr. 1046-1047, 1049, 1052].

Generally, on trial the defense was given every opportunity to examine at length all files and documents [see for example Rep. Tr. pp. 1066-1067, 1124, 1164-1165; line 11 of p. 22].

II.

Proof and Pleading of Conspiracy (Appellants' Specification I).

The appellant's first point is that the two defendants were "charged with a series of separate and multiple little conspiracies". This is a plain misstatement of the record. The indictment charges a single continuing conspiracy. There was no proof offered on multiple conspiracies. There were no instructions offered on multiple conspiracies [Rep.

Tr. pp. 2424-2434, 2453-2454, 279]; and no argument was made that the defendants were enmeshed in multiple conspiracies.

The indictment, Count One, charges a single conspiracy with great particularity, setting forth at length and in detail the period of time that the conspiracy was in effect, its mode of operation and method of working, its object, and a number of simple explicit overt acts (Appendix).

Max and Irving Shayne together are charged with being conspirators in this single conspiracy.

Unlike the *Kotteokos* case (*Kotteokos v. United States*, 328 U. S. 750) where a *single* manipulator of FHA Title I loans dealt separately and distinctly with each of a number of individual home owners, the case at bar is based upon a charge that Max and Irving Shayne were co-conspirators in a conspiracy to submit false claims to the United States in respect to FHA Title I loans knowing that the money so obtained would not be used for home improvements. At no time on the trial of this cause did the Government, the defense, or the court proceed upon the theory that the charge, *i.e.*, the indictment, set forth anything but a single, well defined conspiracy.

Nor is there a variance here between the pleading and the proof as to the single conspiracy charged. As shown by the foregoing Statement of Facts, Max and Irving Shayne shared jointly in the commissions, paid by each of the two dealers involved, for every account on which there was evidence produced at trial. Both appellants were shown to have manipulated the use of sub-contractors' invoices which covered work supposedly performed but not performed on applicant-borrowers' homes, so that the proceeds of checks made payable to such sub-contractors could be diverted from the home improvements set forth

on the credit applications to the personal use of either the Shaynes or the home owners. In some instances the sub-contractors' invoices were created out of "estimates" as in the case of sub-contractors Marsh and Perlman. In other instances the jury could well have believed that the invoices were wholly fictitious. As to these, the sub-contractors' invoices that were typed, the evidence showed that although they came from three different sub-contractors, Angerson, Smith & Company and Mitchell, they were prepared on the same typewriter and were received in connection with accounts handled by the Shaynes for two different construction company dealers, Sponseller & Son and Commercial Improvement Company.

Furthermore the dealers' checks in payment of Smith & Company, Mitchell, and some Angerson invoices were shown to have been endorsed and cashed for the Shaynes by Neiberg. The endorsement on the check in payment of Marsh was also shown to have been forged and it is interesting to note that it is followed by the endorsement "I. Shayne". (See overt acts, Conspiracy count).

Commencing in June of 1952 in the Henry E. Green account, on which the records show the name to be spelled Greene, Max and Irving Shayne were both present at a conversation when Green was told he could have \$800 if he would pay back two for one, or \$1600. This pattern was repeated with the Olsen transaction where again a loan was made on the basis of a two for one repayment. Both Olsen and Green were trying to keep from having their homes taken on foreclosure.

The record is replete with instances where the home owners were misadvised by the Shaynes as to the requirements for FHA loans such as in the Hamilton, Moore, Johnson and Thompson transactions and the record is also

replete with instances where the Title I credit applications were not filled in at the time they were signed or where extra and unauthorized paragraphs were added to construction contracts calling for work to be performed which had never been discussed with the home owner such as the Johnson and Hamilton transactions.

In every instance the Shaynes were apprised of the use that the home owners intended for the proceeds of these loans. In the Green, Olsen, Johnson and Hamilton transactions the loan proceeds were, according to the discussions with the applicants, to be used in large part to pay past due indebtedness on real estate. In the Moore, Drakes and Hamilton transactions the money was to be used in part to pay personal and household bills.

Finally the appellants committed jointly the boldest and most outrageous act of this conspiracy. With the Thompsons, in April of 1953, by causing to be placed on the credit application limited credit references and by providing a fictitious estimate on the billhead of Albert Clipper & Son, the Shaynes induced, advised and caused this credit application and estimate to be delivered to a bank which granted a loan thereon. For this service, out of the very proceeds of the loan, pursuant to the Shaynes' agreement with the Thompsons, Irving Shayne collected a fee of \$895.

Threaded throughout all the transactions there is a common purpose, a common method of operation, a common object, and a concert of conduct on the part of both Max and Irving Shayne.

Under such circumstances, where the conspiracy is so pleaded, but a single conspiracy is charged.

Nye & Nissen v. United States (9th Cir., 1948), 168 F. 2d 846 at 850, and cases there cited.

And in the face of overwhelming evidence that Max and Irving Shayne were co-conspirators in the single conspiracy charged there is not a variance between pleading and proof particularly where the conspiracy is so well defined.

Nye & Nissen v. United States (S. Ct., 1949),
336 U. S. 613 at 616 and 617.

This situation is not altered because the proof presented applies to both conspiracy and substantive counts.

Nye & Nissen v. United States, supra, particularly at 620.

III.

Submitting Indictment to Jury Without Submitting Bill of Particulars (Appellants' Specification II).

Appellants complain that the indictment was submitted to the jury during its deliberations but the Bill of Particulars which they contend limited its scope was not.

What we have to say under our discussion of the court's instructions is in part applicable here and reference is made to Point IV of this Argument.

However two other propositions answer appellants' point here.

First, whether the indictment or exhibits should be taken to the jury room is within the discretion of the trial court.

Little v. United States (10th Cir., 1934), 73 F.
2d 861, 864, reversed on other grounds;

C. I. I. Corporation v. United States (9th Cir.,
1945), 150 F. 2d 85 at 91;

Buckley v. United States (6th Cir., 1929), 33 F.
2d 713 at 717.

The jury should be charged that the indictment is not evidence in the case and such an instruction was given [Rep. Tr. p. 2411].

Secondly, this very matter was brought to the attention of defendants and their counsel in a discussion with the court early in the trial and the court advised that it was his practice to send the indictment to the jury room and the court clearly offered to hear and pass upon any proposed deletions from the indictment the defense cared to present [Rep. Tr. pp. 1121-1122]. We quote the last portion thereof:

“If there are some parts of this indictment that the defense feels should not be read, advise me and I will consider not reading any portion as to which you think there should be an omission.”

No objections or exceptions to this matter were taken at any time thereafter nor did the defense ever advise the court of its position on this question.

Nor was this question raised in a motion for new trial or the argument thereon [Clk. Tr. pp. 210-214; Rep. Tr. p. 2534 *et seq.*].

Appellants should not now be heard to complain.

Holingren v. United States, 217 U. S. 509 at 520.

IV.

Instruction on Conspiracy (Appellants' Specifications III and X).

In each instance that appellants set forth a quotation from the trial court's instruction there is a misquote (Appellants' Br. pp. 4-5, 14). We quote verbatim from the record:

“While it is necessary that there be two or more conspirators, one of the persons on trial can be found

to have not been one of the two or more. Now, the case as it has developed here has presented the possibility that many persons other than those on trial might lawfully be found to have been members of a conspiracy. And if you believe one or the other or both of the defendants were members of such conspiracy, then you could return a verdict of guilty as *to such defendant.*" [Rep. Tr. pp. 2453-2454.] (Italics added.)

Appellants complain in their second specification of error that the court instructed the jury in effect that the defendants could be found guilty if they conspired with others, where the Bill of Particulars states that the Government will not contend that there were other conspirators with the defendants. Appellants' position in this regard is that this permitted the jury to find them guilty on a different "charge" than the one against them.

The appellants' position fails to take into account the effect of a Bill of Particulars and the way the matter developed at trial.

First, appellants again confuse the charge against them, which is contained in the indictment, with the proof offered in respect thereto and the proof that could be tendered under the Bill of Particulars. It is to be noted in this regard that the Government did not state in its Bill of Particulars that there were no other conspirators. The Bill of Particulars furnished by the Government contains the following statement: "The Government will not contend at the trial that any other persons were co-conspirators with the defendants;" [Clk. Tr. p. 70], which is tantamount to a statement that the Government *will not offer proof* that there were additional conspirators. The order of the court on the demand for Bill of Particulars

in this respect provided that the Government was to furnish the names of co-conspirators if they were known to the Government and it was in response to this order that the Government so replied [Clk. Tr. p. 69].

Whether the "charge" is changed or not depends upon the purpose and effect of a bill of particulars.

The fundamental purpose of such a bill is to furnish sufficient additional detail, where the indictment is in general terms, so that a defendant may prepare his defense and be protected from a second prosecution for the same offense.

Kaufman v. United States (6th Cir., 1947), 163 F. 2d 404;

Rubio v. United States (9th Cir., 1927), 22 F. 2d 766;

Robinson v. United States (9th Cir., 1929), 33 F. 2d 238;

Stillman v. United States (9th Cir., 1949), 177 F. 2d 607 at 615.

The bill of particulars does not amend the indictment nor change the nature of the charge.

United States v. Lefkoff (1953), 113 F. Supp. 551, 554-555;

Williams v. United States (5th Cir., 1949), 170 F. 2d 319, 320;

Krause v. United States (8th Cir., 1920), 267 Fed. 183.

Nor does it subtract or eliminate matters pleaded.

United States v. Norris (1930), 281 U. S. 619 at 622;

Dunlop v. United States (1897), 165 U. S. 486, 491;

Krause v. United States (8th Cir., 1920), 267 Fed. 183;

United States v. Comyns (S. Ct., 1919), 248 U. S. 349.

Nor add elements omitted.

United States v. Johnson (1944), 53 F. Supp. 167, 172.

On trial, the bill has the effect of limiting the scope of the Government's proof.

United States v. Neff (3rd Cir., 1954), 212 Fed. 297, 309 *et seq.*;

United States v. Pillsbury Mills (1955), 18 F. R. D. 91 at 93;

United States v. Brennan (1955), 134 F. Supp. 42 at 53.

It follows that the "charge" in this case remains the same as set forth in the indictment, *i.e.*, that the defendants were members of the conspiracy described in Count One, notwithstanding the foregoing statement in the Bill of Particulars.

Changes of membership in a conspiracy do not alter or change the fundamental aspect of the conspiracy—conspirators can come and go as long as there are at least two.

Nye & Nissen v. United States (9th Cir., 1948), 168 F. 2d 846, 850;

Marino v. United States (9th Cir., 1937), 91 F. 2d 691 at 696, and cases cited in footnotes 23 through 26.

A criminal conspiracy is essentially the agreement to violate the law in the particulars described with the performance of an overt act thereunder.

Marino v. United States, *supra*, at pp. 694-695.

It cannot be defined by merely naming a group of people and it has been held that the names of conspirators are not an essential part of the description of the conspiracy.

Leverkuhn v. United States (5th Cir., 1924), 297 Fed. 590.

Where the criminal agreement is described with particularity as to law violated, the time continuing, the mode and method of operation and the objectives, the conspiracy or agreement thus becomes fixed.

Leverkuhn v. United States, supra.

The court's instructions did not allow the jury to convict the defendants of any other conspiracy in this respect than the one charged in the indictment and the jury was so told [Rep. Tr. pp. 2412, 2424-2434, particularly 2429-2430].

Changes in the membership of the conspiracy do not, therefore, change the nature of the charge and it is submitted appellants' cases are not in point.

The Government did not exceed the *limitation of proof* effected by the Bill of Particulars. It did not present evidence nor argue to the jury that there were other conspirators. The defense made no objections to any evidence offered and they at no time claimed surprise by evidence of other conspirators.

It was the defense that expanded the proof beyond the Bill of Particulars.

Time after time in the course of this trial the defense asserted that witnesses presented by the Government were accomplices, that these witnesses were guilty of offenses

which necessarily aided the Shaynes in carrying out their scheme.

The defense theory that others were accomplices of the Shaynes is shown by the nature of the defense cross-examination and the questions asked:

As to Johnson [Rep. Tr. pp. 1006-1007, 1036-1037]; Olsen [Rep. Tr. pp. 816-817, 835-836, 838-841, and especially 846]; Nathanson of Commercial Improvement Company [Rep. Tr. pp. 1412-1413]; Miller of Commercial [Rep. Tr. pp. 1817-1822]; Novak of Commercial [Rep. Tr. pp. 1856-1857]; Drakes [Rep. Tr. pp. 567-568, 580-581]; Hamilton [Rep. Tr. pp. 451-452, 464-465, 470-474, 508-509, 530-532]; Neiberg [Rep. Tr. pp. 1487-1488, 1492, and especially 1494-1495, 1497-1501];

Or by counsels' direct representations to the court:

Generally [Rep. Tr. p. 1116]; as to Nathanson of Commercial Improvement Company [Rep. Tr. pp. 1345-1348, 1388]; Novak of Commercial [Rep. Tr. pp. 1856, 1869];

And by instructions they tendered and argued to the court:

Defense instructions numbered 58, 59 and 60 [Clk. Tr. pp. 192-194] and additional request [Rep. Tr. pp. 2438-2439].

The trial court recognized the change in the scope of the proof. We quote from the instruction complained of, with italics added:

"Now, the case *as it has developed here* has presented the possibility that many persons other than those on trial might lawfully be found to have been members of a conspiracy."

Under this state of affairs the entire instruction was proper.

This view of the defense approach to the case is substantiated by the fact that the defense did not tender any instruction to the court on this precise point; *they never took exception nor objected to the instruction given*; and they never presented or argued the matter in their motion for new trial [Rep. Tr. pp. 2438-2450, 2534 *et seq.*]. No one could overlook this instruction coming as it did in response to a question from the jury [Rep. Tr. pp. 2453-2454] and yet highly experienced defense counsel did not object and only requested additional instructions on the burden of proof at the time the court gave them opportunity to speak [Rep. Tr. pp. 2494-2495].

Appellants should not now be heard to complain for the first time that the instruction was improper.

- Federal Rules of Criminal Procedure, Rule 30;
Benatur v. United States (9th Cir., 1954), 209 F.
2d 734 at 744, cert. den., 347 U. S. 974;
Las Vegas Merchant Plumbers v. United States
(9th Cir., 1954), 210 F. 2d 732 at 744, 745;
Kobey v. United States (9th Cir., 1953), 208 F.
2d 583 at 597, 598;
Krembring v. United States (8th Cir., 1954), 216
F. 2d 671 at 673;
Mosca v. United States (9th Cir., 1949), 174 F.
2d 448 at 451;
Brown v. United States (9th Cir., 1953), 201 F.
2d 767 at 770;
Enriques v. United States (9th Cir., 1951), 188
F. 2d 313;
Diehl v. United States (8th Cir., 1938), 98 F. 2d
545 at 547.

Lastly, if the instruction was technically in error it was harmless and non-prejudicial in the face of the overwhelming weight of evidence that the Shaynes conspired directly with each other. Whether in addition the jury found the Shaynes conspired with others is immaterial. The court's attention is directed to the fact that the great bulk of the evidence here that the Shaynes were working together stands wholly uncontroverted.

Federal Rules of Criminal Procedure, Rule 52(a)
(18 U. S. C.);

Schowers v. United States (D. C. Cir., 1954), 215
F. 2d 764;

United States v. Spadafora (7th Cir., 1950), 181
F. 2d 957 at 959;

Clark v. United States (8th Cir., 1954), 211 F.
2d 100 at 106;

Tanchuck v. United States (10th Cir., 1937), 93
F. 2d 534, 537;

United States v. Sansone (2nd Cir., 1956), 231
F. 2d 887 at 891;

Neal v. United States (D. C. Cir., 1950), 185 F.
2d 441 at 442.

V.

**Verdicts Contrary to Law and Evidence; Denial of
Judgments of Acquittal (Appellants' Specifica-
tions IX(a), (b), (c) and (d), and XII).**

In appellants' point IX(a) they contend that Irving Shayne was acquitted of all overt acts under the conspiracy and therefore is adjudicated not guilty of the conspiracy (Appellants' Br. p. 20). This proposition falls for a number of reasons.

First, overt acts numbered 2, 4 and 6 of Count One had substantial proof offered in respect thereto and no part of the jury's verdicts under the substantive counts is inconsistent with the finding that these overt acts were performed as alleged pursuant to the conspiracy set forth in this count. Only one overt act pleaded need be proved to consummate the conspiracy and the jury was so told [Rep. Tr. p. 2429].

Marino v. United States, supra, at 694.

Furthermore the jury inquired and the court properly instructed that each count was to be considered separately [Rep. Tr. p. 2455]. The verdicts on the various counts of this indictment need not be consistent with each other.

United States v. Petti (2nd Cir., 1948), 168 F. 2d 221 at 224;

Selvester v. United States (S. Ct., 1898), 170 U. S. 262;

Dunn v. United States (S. Ct., 1932), 284 U. S. 390 at 393;

Bell v. United States (8th Cir., 1924), 2 F. 2d 543;

Seiden v. United States (2nd Cir., 1926), 16 F. 2d 197;

Coplin v. United States (9th Cir., 1937), 88 F. 2d 652 at 661;

Stein v. United States (9th Cir., 1946), 153 F. 2d 737, 744;

Pilgeen v. United States (8th Cir., 1946), 157 F. 2d 427, 428;

Robinson v. United States (9th Cir., 1949), 175 F. 2d 2;

United States v. Coplon (2nd Cir., 1950), 185 F. 2d 629 at 633;

Ross v. United States (6th Cir., 1952), 197 F. 2d 660.

The doctrine of *res adjudicata* does not apply here because there was additional and different evidence adduced on the conspiracy count and there were other and different overt acts set forth in the conspiracy count upon which there was separate proof as stated above, there is nothing in this record to preclude the jury from finding one of the different overt acts to have been performed. Or the jury could have found that overt act number two was performed by Max Shayne, as pleaded, pursuant to the conspiracy alleged. If so the jury properly found both Max and Irving guilty of Count One.

United States v. Petti, supra, p. 224.

Counsel's bland assertion in point IX(c) that the false statements were the independent acts of the home owners is contrary to the uncontroverted testimony of nearly all of the home owners, the testimony of both handwriting experts, and nearly all of the corroborative detail of the evidence. See Statement of Facts.

The "two witness rule" requested by appellants is discussed under our argument number VIII.

VI.

Rulings on Motion for New Trial (Appellants' Specifications IV and VII).

A. Claim of Defective Hearing of Juror.

It is apparent from the record that the juror who is claimed to have bad hearing actually answered by nodding on the first poll of the jury [Rep. Tr. p. 2500], although his next answer was not responsive to the court's inquiry. But the juror answered understandingly after the verdict was re-read to him [Rep. Tr. p. 2501].

The court's observations to the effect that the juror was capable of hearing are shown in the record [Rep. Tr. pp. 2505, 2515-2518] and the trial court made specific findings in this regard and concludes the juror heard the evidence [Rep. Tr. pp. 2547-2548].

The denial of a new trial for disqualification of a juror is not an abuse of discretion in the absence of objection before the verdict.

Bush v. United States (5th Cir., 1927), 16 F. 2d 709;

United States v. Nystrom (1953), 116 F. Supp. 771;

United States v. McGrady (7th Cir., 1951), 191 F. 2d 829.

It has been generally held that a party who waits until after the verdict to object to a juror's deafness is deemed to have waived the right to such objection.

United States v. Baker, Fed. Cas. No. 14499 (D. C. N. Y., 1868), 24 Fed. Cas. 953;

Tollackson v. Eagle Grove, 213 N. W. 222, 203 Iowa 696;

Higgins v. Commonwealth, 155 S. W. 2d 209, 287 Ky. 767;

State v. Power (Mo., 1926), 285 S. W. 412;

Lindsey v. State, 225 S. W. 2d 533, 189 Tenn. 355.

In *United States v. Baker*, *supra*, it was said concerning a partially deaf juror, "on principle, as well as on authority, nothing that is a cause of challenge to a juror before verdict can be used to set aside a verdict, as for a mistrial, even though the cause of challenge was unknown to the party when the jury were sworn."

The reason for this rule is said to be that the defendant has the opportunity to discover the defect and so cannot complain unless he can show the juror's hearing was so bad that it substantially prejudiced the defendant's rights.

B. The Incident of One Juror Falling Asleep.

The trial court's observations of this matter are shown [Rep. Tr. pp. 2548-2555] and the situation obtaining at the time is that the juror slept about 30 seconds [Rep. Tr. p. 2555] during the Government's case on direct examination [Rep. Tr. p. 2552] at a stage where an alternative juror could have been substituted [Rep. Tr. p. 2552].

If a juror falls asleep during the trial it is not grounds for a new trial unless it is called to the attention of the court and only then if the court ruled that it was for a length of time to be prejudicial to the defendant.

United States v. Boyden, Fed. Cas. No. 14632 (Cir. Ct., D. Mass.), 24 Fed. Cas. 1213;

Newman v. L. A. Transit Lines, 120 Cal. App. 2d 685, 262 P. 2d 95;

Fleener v. Erickson, 215 P. 2d 885.

VII.

Constitutional Questions (Appellants' Specifications
IV and VII).

The test, as to whether a statute is unconstitutional because it is vague and indefinite, "is whether the language conveys sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices."

Jordan v. De George (1951), 341 U. S. 223.

The act must give the accused sufficient warning so he knows or could know that the act he does is a crime. "But where the punishment imposed is for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of the law."

Screws v. United States (1945), 325 U. S. 91.

If the statute employs words or phrases which are sufficiently certain by reason of their having a technical meaning or a well-settled common-law meaning then it is not void for being vague and indefinite.

Connally v. General Construction Co. (1926), 269 U. S. 385.

Section 1010 prohibits making, passing or uttering any statement knowing it to be false, or forging, altering or counterfeiting any document, or uttering or publishing any such document knowing it to be false, in order to obtain a loan insured by the FHA. The statute requires the act to be knowingly done and all the prohibitions, such as passing or uttering a false statement, or forging a document, have a well-settled meaning and have been construed and defined throughout the development of the Common Law.

VIII.

Two Witness Rule on False Statements (Appellants' Specification VIII).

There has been no case in which it has been held that the two-witness rule in respect to perjury prosecutions applies to Section 1010, Title 18, United States Code. Indeed there have been no cases which have considered the matter.

However, there have been several cases which have considered the matter with respect to Section 1001, Title 18, United States Code. This section says that it is a crime to make false statements about any matter which is within the jurisdiction of any department or agency of the United States. This is much broader than Section 1010 which concerns only fraud or false statements in connection with obtaining FHA insured loans.

There are two cases, both in the Ninth Circuit, which have held that the perjury rule does not apply to false statements proscribed by Section 1001.

Todorow v. United States (9th Cir., 1949), 173 F. 2d 439;

Fisher v. United States (9th Cir., 1956), 231 F. 2d 99.

In *Todorow v. United States* the court said, "there is no sound rule for invoking the perjury rule here . . . It is not a question of an oath against an oath."

The court in *Fisher v. United States*, at 105-106, said that the reasons behind the perjury rule were not applicable in these cases.

One case has held that the perjury rule does apply to Section 1001.

United States v. Levin (Dist. Colo., 1953), 133 F. Supp. 88.

But in that case the court places great stress on its objections to prosecutions for voluntary statements made to investigating agencies. The court made it clear that in the case of a claim against the United States, or some similar dealing where the accused was attempting to get something from the government, that the perjury requirement would not apply.

It said, "There are numerous decisions which have upheld prosecutions under this section. Substantially, all of them have to do with false documents, and generally they are cases involving claims against the United States."

Conclusion.

On the facts in this record and the law applicable thereto, and for the reasons stated herein, the judgments entered are proper and free from prejudicial error and should be affirmed.

Respectfully submitted,

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APPENDIX.

United States District Court for the Southern District of California, Central Division.

September, 1955, Grand Jury.

United States of America, Plaintiff, vs. Max Shayne and Irving Shayne, Defendants. No. 24674 CD.

INDICTMENT.

(U. S. C., Title 18, Secs. 371, 1010, and 2—Conspiracy,, making false statement to lending institution in FHA transaction, aiding.)

The grand jury charges:

Count One.

(U. S. C., Title 18, Sec. 371.)

Beginning on or about the month of June, 1952, and continuing until the month of April, 1953, defendants Max Shayne and Irving Shayne did wilfully and knowingly agree and conspire together and with other persons, whose names are to the grand jury unknown, as follows:

(a) To defraud the United States of America by causing an agency thereof, to wit: the Federal Housing Administration, to insure and guarantee loans for home improvements pursuant to Title I of the National Housing Act, as amended, United States Code, Title 12, Section 1703, by means of false and fraudulent written statements which would be knowingly and wilfully made by the defendants and their co-conspirators, pursuant to said conspiracy, which loans would not conform to said Act and the regulations issued pursuant thereto and which loans would not be entitled to be insured, nor would they

be insured pursuant to said Act, but for said false and fraudulent statements, as said defendants well knew;

(b) To commit certain offenses against the United States of America in violation of United States Code, Title 18, Sections 1010 and 2, by knowingly and unlawfully causing to be passed, uttered, and published certain false statements to lending institutions, for the purpose of obtaining for certain applicants loans and advances of credit from said lending institutions, with the intent that such loans and advances of credit would be offered to, and accepted by, the Federal Housing Administration for insurance;

It was a part of said conspiracy and an object thereof that defendants Max Shayne and Irving Shayne, singly or together, would meet with certain persons who were home owners and who, as the defendants well knew, desired money, which said home owners intended to use for various and sundry purposes not relating to the improvement of their homes; by promising to assist said home owners to secure a loan of money, defendants Max Shayne and Irving Shayne were to induce and persuade said home owners to affix their signatures to contracts whereby said home owners would agree that a construction and improvement company would furnish materials and services to improve their homes; the defendants, in addition, agreed that they would induce and persuade said home owners to sign certain other documents including FHA Title I Credit Applications which, in addition to the contract aforementioned, the defendants thereafter would cause to be passed, uttered, and published to lending institutions for the purpose of obtaining for said home owners loans or advances of credit from said lending institution, which loans or advances of credit, it was intended, would be offered to, and accepted by, the Federal

Housing Administration for insurance; it was known and agreed by the defendants that the documents to be signed by the home owners and to be utilized by said defendants as described hereinbefore would include, among others, FHA Title I Credit Applications which would state that the proceeds of the loans applied for by said home owners (hereinafter referred to as "applicant-borrowers") would be used to improve the property of said applicant-borrowers in a manner and in an amount to be described by said credit applications; these credit applications and the statements contained therein would be false, as said defendants well knew, for, in truth and in fact and to the knowledge of said defendants, the applicant-borrowers would not intend to use, nor would they use, the proceeds of the loans applied for to improve their property in the manner and in the amount as described by said credit applications, but rather said applicant-borrowers, at all times, would intend to use, and would use, the proceeds of the loans for various and sundry purposes not relating to the improvement of their homes and not within the authorized purposes for such insured loans as set forth by the National Housing Act, as amended, and the regulations thereunder;

It was a further part of said conspiracy and an object thereof that said defendants, in their capacity as employees and salesmen for certain home improvement and construction companies, would arrange for such work as was ordered to be done by said applicant-borrowers to be performed by persons herein called "subcontractors"; the defendants would conspire together and agree to submit invoices from said subcontractors to the home improvement and construction companies, for which the defendants acted as employees and salesmen, which in-

voices would purport to show that said subcontractors had completed the work requested of them upon the home of said applicant-borrowers, the defendants agreed that said invoices would be false for, in truth and in fact, the above-mentioned work would not have been performed by said subcontractors; by this device defendants would acquire for their own personal gain the money which was intended for said subcontractors by reason of the invoices submitted by them; and

To effect the objects of said conspiracy the defendants Max Shayne and Irving Shayne committed divers overt acts in the Central Division of the Southern District of California, among which are the following:

(1) On or about June 1, 1952, defendants Max Shayne and Irving Shayne had a conversation with Henry Green and Martha Green at 11722 South Avalon Boulevard, Los Angeles, California;

(2) On or about June 11, 1952, defendant Max Shayne had a conversation with Charles Neiberg at Drexel and Fairfax Avenues, Los Angeles, California, concerning the endorsement of a check drawn by the Commercial Improvement Company in the amount of \$900.00 to the order of Smith and Company;

(3) On or about October 15, 1952, defendants Max Shayne and Irving Shayne had a conversation with Mandell Drakes and Moshell Drakes at 620 East 89th Street, Los Angeles, California;

(4) On or about November 10, 1952, defendant Irving Shayne received payment at the Bank of America National Trust and Savings Association, Wilshire and Crescent Heights Branch, Los Angeles, California, upon a check in the amount of \$1,030.00 drawn by the Commer-

cial Improvement Company to the order of James J. Marsh;

(5) During the month of April, 1953, defendants Max Shayne and Irving Shayne had a conversation with Mr. and Mrs. Archie L. Thompson at 5126 Towne Avenue, Los Angeles, California;

(6) On or about April 20, 1953, defendants Max Shayne and Irving Shayne submitted to the Citizens National Trust and Savings Bank, Leimert Park Branch, Los Angeles, California, an "estimate" in the amount of \$2,395.00 upon the letterhead of Albert Clipper and Sons.

ABSTRACTS OF CREDIT APPLICATIONS.

Title I, FHA.

Exhibit 5-III. Credit application dated June 1, 1952, in the applicant's name of Harry Greene, with home address 11722 South Avalon Boulevard, Los Angeles, California, purportedly signed "Harry Greene Margret Greene" with the further signatures "Shayne-L. Novak, President, Commercial Improvement Company"; which credit application called for work on the above premises, as follows: "Remodel interior, plaster-paint-paper-linoleum" for a cost of \$1600;

Exhibit 60-IX. Credit application dated June 16, 1952, in the applicant's name of Earnest C. Johnson, at 10525 South Avalon Boulevard, listing the property to be improved as 1239 East 127th Street and setting forth the improvement to be made as "Interior work" for a cost of \$1300, signed on the reverse side as follows: "Earnest C. Johnson, Flordie Mae Johnson, Commercial Improvement Company, L. Novak, President."

Exhibit 48-VII. Credit application date July 12, 1952 in the name of the applicant John W. Olsen, setting forth work to be performed as: "Exterior painting, repair plumbing" for a cost of \$1200, signed "John Olsen, Leona Olsen, M. Shayne, H. R. Nathanson, V. President."

Exhibit 31-VI. Credit application dated September 8, 1952 in the name of the applicant David L. Hamilton, at 17440 Tiara, Encino, California, covering work to be performed as follows: "Mastic and linoleum, remodel interior and paint" for a total cost of \$1580, \$880 for contractor and dealer Sponseller, and \$700 customer, signed by David L. Hamilton and Sylvia A. Hamilton.

Exhibit 25-V. Credit application dated October 1, 1952 in the name of applicant Eligh S. Moore, setting forth work to be performed as follows: "Tile kitchen, fix up exterior and paint both houses" for a cost of \$500 to Sponseller and \$600 to customer.

Exhibit 11-IV. Credit application dated October 15, 1952 in the name of applicant Mandell Drakes at 620 East 89th Street, Los Angeles, California, setting forth work to be performed "Construction—enclose front porch, painting interior of house" for a total cost of \$1390, signed by Mandell Drakes, Moshell Drakes, and Commercial Improvement Company, L. Novak, President.

Exhibit 1-II. Credit application dated April 23, 1953 in the name of Archie L. Thompson, 10962 South Avalon, Los Angeles, showing the property to be improved as 5126 Towne Avenue, Los Angeles, setting forth work to be performed as "New roof, new plumbing fixtures, plaster and repair interior, paint entire interior, new tiling and finish garage" for a total cost of \$2395, signed by Archie L. Thompson and Viola Thompson, showing a contractor "Mr. Clipper."

APPLICABLE SECTIONS OF TITLE 18, UNITED STATES
CODE.

Section 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Section 1010. Federal Housing Administration transactions.

Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or docu-

ment, knowing it to have been altered, forged, or counterfeited, or wilfully overvalues any security, asset, or income, shall be fined not more than \$5,000 or imprisoned not more than two years, or both. June 25, 1948, c. 645, 62 Stat. 751.

Section 2. Principals.

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.





